

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX
FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8011

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
A CORPORATION, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER,
UNITED STATES EMPLOYEES' COMPENSA-
TION COMMISSION, AND JAMES E. BRASWELL,
Appellees.

Appeal from the District Court of the United States
for the District of Columbia

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This case is an appeal from a final decision and order of the District Court of the United States for the District of Columbia. In such cases appellate jurisdiction is vested in this Court by Act of March 3, 1891, C. 517, Sec. 6 (26 Stat. 828) and amendments, U. S. C. Title 28, Sec. 225.

The suit in the District Court was for an injunction restraining a compensation award of the Deputy Commissioner of the U. S. Employees' Compensation Commission, and was filed by authority of Act of March 4, 1927, C. 509, Sec. 21 (44 Stat. 1436) and amendments, U. S. C. Title 33, Sec. 921.

STATEMENT OF THE CASE.

On February 15, 1930, James E. Braswell was 63 years old and was in the employ of The Great Atlantic & Pacific Tea Company, hereinafter referred to as "the A.&P." On that date he lifted a 75 to 100 pound box which caused a severe pain in his " * * * hip and back * * *" (Appellant's App. 8-9-10). At the time of the injury Mr. Braswell had hypertrophic osteo-arthritis of the spine, and trouble in his sacroiliac and hip joints, which condition he had had for a long period of time (Appellant's App. 13 through 16).

After a hearing, and on August 31, 1931, a compensation order was entered by Deputy Commissioner Hoage awarding compensation to Mr. Braswell for temporary total disability at the rate of \$11.54 per week (Appellant's App. 7). On November 22, 1934, pursuant to the A.&P.'s application for a modification of the award, Deputy Commissioner Hoage entered an order adjudging Mr. Braswell's condition to be then ". . . one of temporary partial disability" under Section 8 (e) of the Act (Appellant's App. 17-18). For a period of five years from August 1935, the employer paid compensation of \$11.54 per week, and then payments were suspended (Appellant's App. 7).

A hearing was had before Deputy Commissioner Cardillo who held on March 11, 1941, that Mr. Braswell's then condition was one of temporary total disability as a result of the injury sustained (Appellant's App. 8).

A bill of complaint was filed in the District Court to enjoin the enforcement of the award and to suspend or set aside, in whole or in part, the findings of the Deputy Commissioner. This bill is mainly predicated on two grounds:

(a) Any disability due to any injury received in the employ of the A. & P. at most was temporary partial under Section 8 (e) of the Act, and the employer has fulfilled its obligation by continuing payments for five years; and

(b) There is no line of evidence that Mr. Braswell's present condition is due to any injury, but the evidence is that his present condition is due to his advanced age of 75 and his proliferative osteo-arthritis of the spine (Appellant's App. 2 through 4).

A motion to dismiss was filed (Appellant's App. 5-6). This was sustained by Judge Bailey because he thought "... that there was substantial evidence in support of the findings of the Deputy Commissioner" (Appellant's App. 6).

The order dismissing the bill (Appellant's App. 7) was appealed to this Court.

STATUTES INVOLVED.

Act of March 4, 1927 C. 509 Section 8 (44 Stat. 1427) as amended, U. S. C. Title 33, Section 8 (e):

"Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years."

STATEMENT OF POINTS.

1. The Court erred in sustaining the motions to dismiss and in dismissing the Bill filed herein;

2. The Court erred in failing to sustain the Bill and issue the injunction prayed for enjoining the enforcement of the award, or setting aside the Findings of Fact and Award in whole or in part;

3. The Court erred in holding there is any substantial evidence to sustain the Findings of Fact and Award;

4. The Court erred in holding that the present condition of James E. Braswell is due to or is a result of an injury received while in the employ of the A. & P.; and

5. The Court erred in failing to hold that the present condition of James E. Braswell is primarily due to causes other than any injury received while in the employ of the A. & P.,—such causes being old age and a proliferative arthritis of the spine that existed at the time of his employment by the A. & P., and for which it is in no way responsible.

SUMMARY OF ARGUMENT.

There is no medical evidence to support the finding of Deputy Commissioner Cardillo. The medical evidence admits that Mr. Braswell is totally disabled at age 75, but overwhelmingly shows that this disability is not due to an injury but is due to his age and the proliferative osteoarthritis of the spine, sacro-iliac joint, and hip joints. This condition was of long duration prior to the first injury in February 1930.

To allow the award to stand in this case is simply to turn the Act into an old-age benefit or pension law. This will defeat the purpose of the law.

On November 22, 1934, it was found by agreement that the extent of Mr. Braswell's disability due to injury was "temporary partial" under Section 8 (e) of the Act. The

benefits for temporary partial disability having been paid for a period of five years, the employer has discharged its maximum liability under Section 8 (e) which specifies that benefits “. . . shall not be paid for a period exceeding five years.”

The law is settled that the employer is not responsible for all the ailments his employee may have, but is required to provide compensation only for disabilities arising out of and in the course of employment, even though the extent of the disability may be partly due to the employee's physical condition. Here the primary cause of the disability is arthritis which existed prior to employment by the A. & P. Full compensation has been paid for any increase of disability due to any injury, and no disability now exists that is due to injury.

ARGUMENT.

Condition of Mr. Braswell Not Due to Injury but to Old Age and Arthritis.

In appealing this case I know that the findings of the Deputy Commissioner will be sustained if based on any “substantial evidence.” This phrase “substantial evidence” has been defined by this Court in *Avignon Freres, Inc. v. Cardillo*, App. — D. C. —, 117 F. (2) 385, as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” However, there must be some “substantial evidence” to support the findings, and there is none in this record.

Aside from the foregoing, the record conclusively shows that the present condition of Mr. Braswell is due entirely to his old age and his arthritis which existed before any injury. Had he never received a back strain or injury in his life, his present condition would have been what it is due to the arthritis that had existed for a long period of time prior to the date of the first injury on February 15, 1930. This man became 75 years of age in September, 1941 (Appellant's App. 8). The chances are 100 to one that if he had

never had either an injury or this arthritis of the spine he would not now be able to carry on the arduous duties of a grocery clerk. To award him compensation is simply to turn this compensation law into an old age pension.

The only evidence on the relation between his present condition and his advanced age, his osteo-arthritis of the spine, and his injuries is that of the doctors who testified in the case. Dr. Dunlap P. Penhallow testified for Mr. Braswell at the August 1931 hearing. He said then that Mr. Braswell "... for a long period of time . . . had hypertrophic osteo-arthritis of the spine, sacro-iliac and hip joints, . . ." and the strain of lifting while in the employ of the A. & P. had been a large factor "... in aggravating the symptoms . . ." Note that Dr. Penhallow simply thought the strain had aggravated the symptoms. Even then the doctor would go no further than to say that the condition was due to the arthritic condition of the spine "... plus a super-imposed strain" (Appellant's App. 11-12).

Dr. J. H. Talbot testified for the A. & P. in 1931, and his testimony is substantially the same. The first pain symptoms showed up in 1929, some weeks prior to the first back strain, and X-ray pictures taken in April 1930 showed "marked osteoarthritis of . . . the spine and sacro-iliac joints of long duration" (Appellant's App. 13). In 1931 Dr. Talbot felt that Mr. Braswell had returned to his normal condition, as "any back showing that amount of osteoarthritis of long duration necessarily is a stiffened back" (Appellant's App. 15).

This testimony is set out as showing the condition of Mr. Braswell in 1931, and not for the purpose of attacking that finding. We are foreclosed on that, and, at that time, there was probably some evidence that the injury had contributed to the disability as it then was. However, there does not now exist any disability due to any injury.

In November 1934, Deputy Commissioner Hoage modified the award, and held that the then condition of disability was "... temporary partial disability by reason of said

injury" under Section 8 (e) of the Act (Appellant's App. 18). I will refer to this more fully hereinafter.

At the hearing before Deputy Commissioner Hoage in February 1941, Dr. Frank E. Gantz testified that Mr. Braswell ". . . unquestionably had arthritic changes before the original injury." Dr. Gantz compared X-ray pictures taken prior to the 1941 hearing with previous pictures, and testified that they showed a hypertrophic arthritis, *i. e.*, a proliferative growth getting gradually worse, and the change shown ". . . is about the normal change you would expect in a man of that age" (Appellant's App. 19-20). Dr. Gantz refused to attempt to testify that Mr. Braswell's present condition was due to any injury. He said that there was an "interrelation" between the arthritis, old age, and trauma, but neither he nor anyone else could say where one starts and the other stops (Appellant's App. 21). Furthermore, he admitted other conditions were present, such as hardening of the arteries, that were perfectly normal in a man of this advanced age, which were unconnected with the back condition, and which in and of themselves can be disabling (Appellant's App. 21).

Dr. Talbot made an examination of Mr. Braswell for the A. & P. prior to the last hearing. There is no substantial difference between his evidence and that of Dr. Gantz. Dr. Talbot testified:

"Now it is almost a physical or mental impossibility to say that this man is totally disabled because of these strains, because they are not. (sic—obviously should be 'he is not'.) If we examined this man without any history at all, just simply got him up and examined him and looked at the X-rays, we would see from the clinical picture and the X-rays that we have enough to warrant a stiff back" (Appellant's App. 23).

I do not believe it can be successfully argued that the strains caused the present condition by way of aggravation of an existing condition. Dr. Talbot covers this whole case by saying:

"None of these injuries were of severe character. None of them aggravated the condition. There is no aggravation of this thing. It is simply a question of a man with a back that is old and he has got no business working at a hard trade. It is an unfortunate sort of situation, I will admit, and it is a thing that is going to prevent a lot of these older men from obtaining jobs" (Appellant's App. 23).

Both doctors did testify that a long series of little injuries and strains probably contributed from 25 to 50 per cent to his present condition (Appellant's App. 21 and 24). In a condition of this kind there is a predisposition to strain, ". . . and if this man was younger undoubtedly it would not be necessary to be here because he would probably have been well long ago" (Appellant's App. 24).

I have thought it necessary to set out the medical testimony at length. It is apparent there is no substantial evidence to support the award, and that the present condition of Mr. Braswell is what it would have been if he had never worked for the A. & P.

Present Finding of "Temporary Total Disability."

Deputy Commissioner Cardillo found ". . . as a result of the injury . . . that temporary total disability is continuing . . ." (Appellant's App. 8). There is not one line of evidence to support this finding. Both doctors absolutely state that Mr. Braswell's condition is one of *permanent* total disability (Appellant's App. 18 and 25).

I do not know how or why the Deputy Commissioner reached a conclusion of "temporary total" disability unless it was to connote that Mr. Braswell is suffering from an injury that temporarily disables him, but that he will recover. Thus by using the word "temporary" the Deputy Commissioner implies that his condition is not due to old age and arthritis, which are permanent fixtures, and which are unconnected with employment by the A. & P. The last state-

ment Dr. Talbot made shows (and everyone admits) that the condition is permanent:

“I think a man of his age with his type of back and with the general arteriosclerosis certainly should not be working. I don't believe this man can work, and certainly not in a competitive job such as a clerk in a store, but I think it is due to his age and to his arthritis” (Appellant's App. 25).

This Decision Turns the Act Into a Pension Benefit.

At this junction I would like to point out that if this law is going to be administered so as to allow a recovery in a case of this kind, it is defeating the purpose thereof. It is transforming a compensation law into an old-age or pension benefit. Dr. Talbot is entirely right in stating that it will prevent a lot of older men from obtaining jobs (Appellant's App. 23). The tendency may very likely be for employers to hire only the younger and stronger men. Employers may be afraid to hire older men whose natural infirmities of age may give them an excuse to apply for compensation benefits for the rest of their lives.

I mention this as a possible adverse effect on those men of middle age who are perfectly capable of handling jobs, but who may not be given the chance if employers are to be required to compensate them for infirmities for which they are in no way responsible.

Section 8 (e) of the Act is Applicable.

On November 22, 1934, Deputy Commissioner Hoage on the application of the A. & P. and by agreement of Mr. Braswell modified his finding of 1931, and found Mr. Braswell's condition to be “. . . temporary partial disability by reason of said injury” under Section 8(e) of the Act (Appellant's App. 17). Mr. Braswell stopped work on August 12, 1935, he was paid compensation at the rate of \$11.54 per week, and the A. & P. was advised it would have to pay him this for a total of five years unless he could show he was totally disabled as a result of the injury (Appellant's App.

25). Mr. Hoage's finding in 1934 was that the extent of disability due to the injury was "temporary partial." He was in a good position to judge, Mr. Braswell agreed that was the extent of his disability due to injury, and the A. & P. has paid him for a full five years under Section 8 (e),—the limit of its liability.

Hence, the A. & P. has discharged its full obligation to Mr. Braswell unless he can show that his present condition of total disability is due to injury received in our employ. We submit that it has hereinbefore been demonstrated that this is not true,—but quite the reverse.

Deputy Commissioner Cardillo makes an attack on this modification. He refers to it as ". . . a so-called 'compensation order, modification of award'" (Appellant's App. 7). I assume that this characterization of the modification is intended to hold it is a nullity as otherwise he is clearly bound thereby. There is no basis for any attack on it. The modification determined that the extent of disability due to the injury was under Section 8 (e). There would have been no disability at all except for the presence of the arthritic spine, and Deputy Commissioner Hoage evidently felt the modification was proper since Mr. Braswell and the A. & P. agreed the disability due to injury was under Section 8 (e) of the Act. I cannot see any justification for Deputy Commissioner Cardillo's terming the modification "so-called."

Decided Cases in Point.

It is my firm belief that a case of this kind can and should be decided on the facts. I have tried fairly to present our view of the facts without reference to any other cases. However, there are a few decisions to which I would like to call attention.

Although an award was sustained by this Court, yet we find some very instructive law in the case of *New Amsterdam Casualty Co. v. Cardillo*, 71 App. D. C. 172, 108 F. (2) 492. In that case the employee suffered a hernia, and an

award was made for temporary partial disability under Section 8 (e) of the Act. At the end of five years the employee moved for an enlargement thereof into an award for permanent disability. The proof showed that by virtue of certain supervening diseases, the hernia could not be surgically treated, and the result of the injury was permanent. The Court said:

“Of course, the employer is not responsible for all the ailments which his employee may have, but he is required to provide compensation for disabilities caused by injuries arising out of and in the course of the employment, even though the extent of the disability is partly due to the employee’s physical condition.”

In the *New Amsterdam* case the hernia, the result of an injury was the primary cause of the disability. Thus the employer was liable for disability caused by the injury, even though the extent of the disability was partly due to the employee’s physical condition. Mr. Braswell’s case is precisely the reverse of this. The primary cause of his present disability is the proliferative arthritis that antedated any injury received in the employ of the A. & P. Compensation has been paid for that disability caused by the injury, and there is no present disability caused by any injury. As this Court stated in the *New Amsterdam* case “. . . the employer is not responsible for all the ailments which his employee may have . . .”

The District Court in the State of Washington had a case in which the facts were very similar to the present case in *Grays Harbor Stevedore Co. v. Marshall*, 36 F. (2) 814. The reported case involves a double-barrelled claim,—one angle being for an injury to the employee’s foot, which was allowed, and the other being for an injury to the back, which was disallowed. Doctors testified that the employee “. . . for years he had been and now is afflicted with arthritis of the spine, which might disable him at any time, that his lifting aggravated that condition . . .” The Court quotes the evidence of the plaintiff: “. . . while engaged in lift-

ing, he 'was hurt in the back, . . . got a wrench in my back, . . . gave me a sharp pain in the back, . . . I couldn't continue with no work, . . . I had to quit . . .'" The Deputy Commissioner made an award for total disability. The Court in setting aside the order said:

"The evidence is scanty, ambiguous, indefinite, and uncertain in respect to the elements of effect, continuity, and time, and is not legally sufficient to warrant what appears to be the deputy's arbitrary finding."

Certainly the above-quoted evidence is as strong as the evidence given in this case at the hearing in 1931. The A. & P. has complied in every way with the award for any disability to which an injury might have contributed. There is not now any evidence to support the finding that Mr. Braswell's condition is due to injury. The evidence is overwhelmingly to the effect that his present condition is due to old age and arthritis.

Conclusion.

By virtue of the foregoing, I think this Court will reverse the decision of the District Court and order an injunction against the enforcement of the award.

Respectfully submitted,

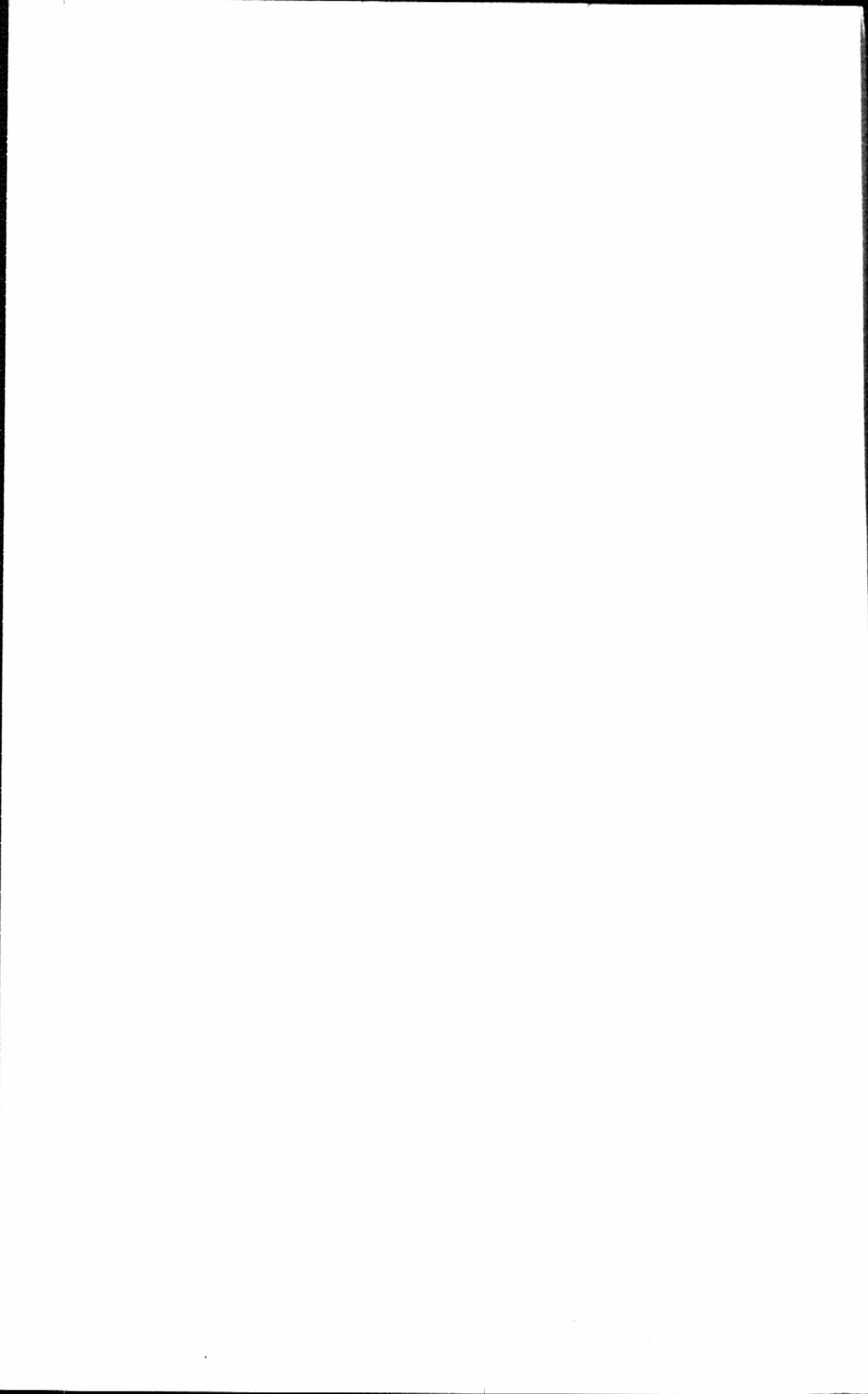
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APPENDIX

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APPENDIX TO BRIEF FOR APPELLANT

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED BY APPELLANT.**

* * * * *

1 *Bill of Complaint for Injunction and Other Relief*
 Under Compensation Statutes

To the Honorable Judges of the District Court:

Your Plaintiff respectfully shows to the Court:

1. That it is a corporation engaged in the retail grocery business, that it does business in the District of Columbia, and its principal office in the District of Columbia is at the address above set out; that the defendant Frank A. Cardillo is the duly appointed and acting Deputy Commissioner of the United States Employees' Compensation Commission charged with the administration of the Longshoremen's and Harbor Workers' Compensation Act, which is also the Workmens' Compensation Act for the District of Columbia, that he is sued as such Deputy Commissioner, and his address is correctly set forth in the caption hereof; and that the defendant, James E. Braswell, is an individual residing in the District of Columbia at the stated address,
2 is a former employee of plaintiff, and the beneficiary of an award against it by the defendant Deputy Commissioner.

2. That this District Court has sole jurisdiction of this proceeding by a section of said Compensation Act, the same being Title 33 U. S. C. A., Section 921 (b), and plaintiff is without method of review of compensation awards except by this bill to have this District Court grant an injunction restraining the enforcement of the said findings and award, or otherwise suspending or setting the same aside in whole or in part.

3. That the plaintiff is the real party in interest as any award under the Act must be paid by it since it is a "self-insurer".

4. That it employed the defendant Braswell approximately one (1) year prior to his receiving an injury in the course of his employment in the District of Columbia on or about February 15, 1930, at a time when the defendant was some 64 years of age, and admittedly had arthritis of the spine, but which last was not known to plaintiff. A com-

compensation order was filed on August 31, 1931, awarding compensation of \$11.54 per week for temporary total disability from the date of the accident. The payments were made, and on September 25, 1934, an application for a modification of the award was made on the ground of a change of condition, and on November 22, 1934, an order modifying the award was entered and the defendant's condition at that time was found to be one of temporary partial disability under Section 8 (e) [Title 33, Section 908 (e)] of the Act. By agreement reflected in the order modifying the award the defendant was re-employed with his duties so arranged that he could handle his work, and this arrangement continued until he re-injured himself on August 13, 1935. Thereafter he did no further work and payments of \$11.54 weekly were resumed by plaintiff, which were continued until August 31, 1940. After total compensation payments of \$4184.08, the payments were suspended on the grounds that: (a) under said Section 8 (e) of the Act the employer was not liable for any further compensation; and, (b) his present condition of disability is due to his advanced age of 74 years and the hypertrophic arthritis rather than to any injury. Pursuant to a hearing the defendant Cardillo on March 11, 1941, made a finding of fact that the defendant Braswell's condition is one of "temporary total disability" and this "as a result of the injury sustained" on August 13, 1935. An award was made for temporary total disability of the benefits accruing from August, 1940 to February 6, 1941, in the sum of \$263.77, and the plaintiff is ordered to pay at the rate of \$11.54 per week "subject to the limitation of the law or until otherwise ordered." A copy of said FINDINGS OF FACT and AWARD is attached hereto as Exhibit 1 to this bill. A copy of the entire proceedings in the office of the Deputy Commissioner will be filed herein as Exhibit 2 to this bill.

5. The award of the Deputy Commissioner is erroneous for the following reasons:

(a) There is no substantial evidence to support the findings and award;

(b) There is no evidence on which to base a finding of "temporary total disability" since all the evidence is that the defendant Braswell's condition is one of total and permanent disability;

(c) There is not one single line of evidence in the record that his present condition of total disability is due to any injury received in the employment of the plaintiff;

(d) The undisputed evidence is that Braswell was suffering from a disability previous to both his first injury and the injury on August 13, 1935, and neither of said injuries would have resulted in total disability, and the Deputy Commissioner erred in failing to allow only compensation for that disability, if any, caused by the subsequent injury, or injuries, as provided in Section 908 (f) (1) and (2)
4 of Title 33;

(e) The undisputed evidence in the record, including that of Braswell's own physician, is that no more than 25 to 50 per cent of his present disability is due to injury or injuries received in the course of employment by the plaintiff, and hence it is error to hold that his present condition is due 100 per cent to injury and allow compensation therefor;

(f) The findings and award are not in accordance with the law; and

(g) The Deputy Commissioner refers to the order of Modification by his predecessor of November 22, 1934, as a "so-called order"; there is neither foundation in fact nor law for this attempt to attack said order.

6. Plaintiff would show that it will pay the award as it is bound by the Act to do, until further order of this Court, but avers that the defendant James E. Braswell is insolvent and cannot repay any part of that which may be paid to him.

7. This is the first application for an injunction or other extraordinary process in this case.

Premises Considered, plaintiff prays;

1. That this Court, or the Clerk thereof, issue a United States writ of Subpoena against the defendants Frank A. Cardillo, as Deputy Commissioner, and James E. Braswell, requiring them to appear, and answer, or otherwise proceed according to law;

2. That the findings of fact and the award of the Deputy Commissioner be suspended or set aside, in whole or in part, for the reasons set out in "5" herein;

3. That the enforcement of the award be enjoined, and the defendants be enjoined from taking steps to enforce the award, for the reasons herein set out;

4. That the Deputy Commissioner be directed to file the entire record of his office as Exhibit 2 to this bill;

5. That upon proper showing and application an injunction pendente lite restraining the enforcement of the award be issued;

5 6. That it be granted all the general relief to which it is properly entitled.

* * * * * * * * *

6 *Motion to Dismiss Complaint for Injunction*

Now come the defendant, Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, by his attorneys, and the defendant, James E. Braswell, by his attorney, and move this Honorable Court to dismiss the bill of complaint for injunction filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity, nor does said bill state a claim against defendants upon which relief can be granted.

2. That it appears from the bill of complaint with exhibits, including the transcripts of testimony taken before the deputy commissioner and made a part thereof as plaintiff's exhibit "2", that the findings of fact of the deputy commissioner in the compensation order filed by him on March 11, 1941, complained of in the bill, to the effect

7 that the injured employee, James E. Braswell, suffered total disability as the result of the injury he sustained on February 15, 1930, during the period from August 13, 1935, to February 6, 1941, and continuing thereafter, are supported by competent evidence, and under the rule of law applicable in this case said findings of fact should be regarded by the court as final and conclusive.

3. That it appears from the bill of complaint with exhibits, including said transcripts of testimony, that the provisions of section 8 (f), subdivisions (1) and (2), of the District of Columbia workmen's compensation law, relied upon by the plaintiff, have no application in the present case; that plaintiff failed to raise any issue with respect thereto at the hearings before the deputy commissioner, and therefore waived any right it may have had to have the court consider any question in regard thereto.

4. That it appears from the said bill of complaint, including said transcripts of testimony, that the compensation order filed by the deputy commissioner on March 11, 1941, complained of in the bill, is in all respects in accordance with law.

5. For such other good and sufficient reasons as may be shown.

* * * * *

8 Endorsed: Filed Jun 30 1941 Charles E. Stewart,
Clerk.

Civil Action No. 10649.

GREAT A. & P. TEA Co.

vs.

CARDILLO.

I think that there was substantial evidence in support of the findings of the Deputy Commissioner and the motion to dismiss the complaint should be sustained.

BAILEY,

J.

* * * * *

9 *Order Sustaining Motions to Dismiss Bill of
Complaint and Allowance of Attorney's Fee*

This action came on to be heard upon the motions of the defendants, Frank A. Cardillo, and James E. Braswell, to dismiss the bill of complaint filed herein, and upon consideration thereof, it is this 9th day of July, 1941,

Adjudged, Ordered and Decreed that the motions to dismiss the said bill of complaint are hereby granted, and the bill of complaint filed herein be, and the same is hereby dismissed, and it is further

Adjudged, Ordered and Decreed that an attorney's fee in the sum of seventy-five Dollars is hereby approved in favor of James E. McCabe, attorney for James E. Braswell, to be paid to him out of any compensation payable in this case.

JENNINGS BAILEY
Justice

Statement of Case by Deputy Commissioner

* * * * * * * *

18 A compensation order was filed in the above-entitled case on August 31, 1931, awarding compensation to the claimant above named for temporary total disability at the rate of \$11.54 per week and directing that compensation payments be continued at the said rate from February 16, 1930, until further order of the Deputy Commissioner. The said compensation order is made a part hereof by reference; On September 25, 1934, the employer applied for a modification of the award on the ground of a change in conditions. Thereafter, on November 22, 1934, a so-called "compensation order, modification of award", was filed, which also is made a part hereof by reference. On August 30, 1935, a notice was filed by the employer indicating that payments of compensation at the rate of \$11.54 per week were being resumed. A further notice was filed by the employer on September 20, 1940, indicating that such payments of compensation had been suspended, and a request was made for formal action terminating the award.

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Findings and Award of Deputy Commissioner

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21 that beginning August 13, 1935, and as a result of the injury sustained, the claimant was wholly disabled, and he is entitled to compensation for such temporary total disability at the rate of \$11.54 per week; that temporary total disability is continuing; that the accrued compensation for temporary total disability from August 13, 1935, to February 6, 1941, inclusive, is \$3,305.39 (286-3/7 weeks at \$11.54 per week); that the employer has paid \$3,041.62 to the claimant as compensation for temporary total disability subsequent to August 13, 1935.

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II.**EXCERPTS FROM TESTIMONY AND PROCEEDINGS
DESIGNATED BY APPELLANT.**

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31 J. E. Braswell, at Aug. 26, 1931 hearing before Deputy Commissioner Hoage.

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Direct Examination**By the Deputy Commissioner:**

32 Q. State your full name? A. J. E. Braswell.

Q. You are the claimant in this case? A. Yes, sir.

Q. What is your address? A. 5514 Sherrier Place, Northwest.

The Deputy Commissioner: All right, Mr. McCabe. You may proceed.

By Mr. McCabe:

Q. Mr. Braswell, will you talk fairly loud because there is a fan working here and the Reporter has to get what you say? A. Yes, sir.

Q. How old are you? A. I will be 65 next month.

Q. How long have you been working, not for the Atlantic and Pacific Tea Company, but how long have you been working during your life? A. I went to work on the farm

when I was 8 years old, working the corn, the peas, digging up potatoes, corn and beans, and such things as a boy that age could do.

Q. And you worked from that time to the time of this injury? A. Yes.

Q. How long have you worked for the Atlantic
33 and Pacific Tea Company? A. About one year.

Q. About a year? A. Yes.

Q. On or about February 15th—what year was that?
1930? A. Yes, sir.

Mr. Marshall: That is right; 1930.

By Mr. McCabe:

Q. Where were you working then? A. 1801 Connecticut Avenue.

Q. What were your duties—just briefly state what your duties were? A. Just the general work of the store, putting up orders for the customers as they came in.

Q. Well, describe—

The Deputy Commissioner (interposing): That is a clerk's work, the work of a clerk in the store?

Mr. McCabe: Yes, the work of a clerk in the store.

The Deputy Commissioner: All right.

By Mr. McCabe:

Q. What were your hours of work, Mr. Braswell? A. I went to work at 8 and I worked until 6 o'clock, except on Saturday and that was until 9 o'clock.

Q. Now, on February 15, 1930,—that was the date
34 of this alleged injury, is that right? A. Yes.

Q. Will you tell us, for the purposes of the record, just how you were injured? A. Well, we were very busy doing the regular store work and about 4:30, and I put up a large grocery order for a lady and when I got it on the counter I went in the cellar and got an empty orange crate and a baseboard carton to put up the customer's order in, and the customer leaves 15 cents to give to a boy that would deliver the order, and when I came back I went on the other

side of the counter to pack all the heavy things that I could into the crate, the canned goods, and things like that, and on top of that I put a 25-pound bag of sugar and the lighter things I put in the pasteboard box up on the counter, and when we had that done, we had to move it then across the room to get it out of the way until the delivery boy came and when I stooped down to pick the box up, as I came up with it, turned from the counter this way (indicating), there was a shooting, a severe pain, something seemed to go loose in my hip and back and there was a severe pain that shot in like that (indicating), but I moved across the floor and when I went to put it down I could not do it.

Q. How much time did that take? A. Oh, it was just like that (indicating).

Q. What would be your estimate as to how much
35 that box weighed? A. It must have weighed at least
75 or 100 pounds. I do not think it was less than that because most of it was canned goods. It had 25 pounds of sugar on top.

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58 Dr. Dunlap P. Penhallow, claimant's witness at
August 1931 hearing.

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60 Q. What did your examination reveal? A. It
showed a fairly well developed and nourished man who was completely stripped for this examination. Man stands and walks with very poor posture. As he stands the trunk is inclined forward and to the left and the left knee is slightly flexed. There is a suggestion of a kyphos in the lumbar region and the thoracic curve is exaggerated. The lateral deviation appears as more of an inclining of the vertebral column rather than as a sciosis. The muscles of the back are very tense, and the back as a whole is rather rigid and backward, forward and lateral movements are very much restricted. When placed in the prone position the back tends to straighten, but this position pains in the lower part of the back. Movement of the hips are normal in flexion and rotation, but there is slight restriction in

abduction of the right hip. No true Kernig could be demonstrated in either leg, but there is considerably more resistance of the right side in straight leg flexion than on the left. There is marked pain on palpation over the right sacro-iliac joint, and movements of the right leg in abduction, rotation and hyper-flexion causes marked
61 pain in this region.

Patient also has a small, easily reducible indirect inguinal hernia on the right side. Tonsils show no abnormality. All of the lower teeth are absent, having been recently removed. Upper teeth present except for some of the molars, but remaining teeth are in poor condition. X-ray shows hypertrophic changes in lumbar region, in sacro-iliac joints and in hip joints.

Q. And what was your diagnosis in this case, Doctor?

A. My diagnosis, as it is stated in my report of May 2nd, 1930, is hypertrophic osteo-arthritis of spine, sacro-iliac and hip joints, probably infectious, associated with an acute exacerbation.

Q. And what impressions did you gain from your examination? A. My report shows: "I believe that this patient has had this condition for a long period of time, probably due to defective teeth, but I believe that the added trauma from attempting to lift a heavy crate has been a large factor in aggravating the symptoms. At the present time this man is totally disabled for all kinds of work, and the length of disability cannot be determined at this time. For treatment would advise physiotherapy, preferably the infra red ray, some support to the back either by strapping or a belt.

I believe this injury as alleged has caused an aggravation of a pre-existing condition."
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Q. Did you find any evidence of strain? A. Well, he had all of these findings that I have indicated in his back, which would go with an osteo-arthritic condition.

Q. Did he give you a history of strain, Doctor? A. He gave me a history of strain, yes, and, as I said, he stated that he had always been well and able to do his work and

about the middle of December, 1929, he began to have pain in the lower part of his back, which he thought was lumbago. These pains gradually grew worse and finally became very severe, especially in the right hip. He kept on working until February 15th, 1930, as I stated before, on which date he had occasion to lift an orange crate which was filled with groceries. This crate slipped and while trying to hold it he felt a sudden severe pain in the back and in the right hip. The following day he kept quiet and, on Monday, February 17, 1930, he was unable to go to work on account of the pain and has been unable to work since that date.

Q. Now, Doctor, considering the history of that case and the situation related to you about the pain while lifting this crate of oranges, what, in your opinion, was the cause of this man's disability when you first examined him? A. Well, I believe he had a combination of things, from the history and the physical findings.

63 Q. What were they? A. He had an old osteo-arthritis condition of the spine for one thing, and the sacro-iliac, hip joint, were affected, plus a super-imposed strain.

Q. Doctor, in your opinion, could the man's condition have been due to the strain which he received imposed on the osteo-arthritis condition? A. Could his condition—

Q. (interposing): As you found it have been due to the strain which was superimposed and which he gave you a history of, superimposed on the osteo-arthritis condition?

A. As I say, I think there was a combination of things there; probably it was the strain, plus the osteo-arthritis.

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74 Dr. J. A. Talbot at August 1931 hearing.

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Direct Examination

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78 I saw the patient on February 25th, and gained this history: Man 64 years old, employed as clerk in store. Had been so employed for about one year. Good

general health. Back began to pain him some in December, 1929, after a period of rather strenuous work handling boxes of grape fruit for the Christmas trade. February 15th put up a heavy order of groceries in an orange crate and in lifting it he had a sudden severe pain in his right hip. Following day he found he could not stand. Has not returned to duty. Teeth were extracted in March and April. X-ray taken in Garfield Hospital in April, 1930, shows—

By Mr. McCabe:

Q. (interposing): Would you mind telling me what year that was? A. 1931.

Q. February 25th, 1931? A. Yes. The x-ray film taken in Garfield Hospital on April, 1930, shows: "Marked scoliosis, convexity to the right. Marked productive changes of all the lumbar vertebrae. Narrowing of the bodies of the vertebrae. Marked osteoarthritis."

In other words, he was bent over so that he was constantly straining himself. For instance, in examining him, talking with him, he could hardly sit down and was
79 just screwing around with pain and every motion seemed to cause a good deal of disability.

I stated in my report, in connection with the history, that "infra-red treatment every other day for eight months. Still having pain in right hip and low back."

My examination disclosed a marked degree of spondylitis deformans with list of spine to the left. Rigid spine, perfectly rigid and motions confined to the hip.

My impression at that time was an old osteoarthritis of the spine and sacro-iliac joints of long duration. The injury in February, 1930, I believed to be secondary, the real factor being the arthritis. I considered that physio-therapy was of little value with this man in his deformed position. Rest in bed for a period of ten days in an attempt to straighten his spine and overcome the spondylitis was what suggested itself to me.

With that in mind, he was finally, after several telephone conversations and a written report that this man should be

hospitalized—I have not made it perfectly clear in my first report that he should be—authority was given to send him to Garfield Hospital and he entered Garfield Hospital on March 25th and was put on a fracture bed and you have heard him complain about that. He remained on the fracture bed until April 3rd when we put on a plaster jacket, a body cast. At that time the cast was applied with
 80 heat traction, so-called traction method, and the cast was applied and, following the wearing of it for a time his back was very much straighter then.

He remained in the hospital several days; I think probably either the next day or the day after, certainly not long enough to get the cast dry, and then he was sent home and I saw him there on several occasions, April 10th, 29th, May 4th and in the office on the 11th and the 18th.

At the time of my first examination on February the 25th I stated that this man "Will never be able to return to duty requiring heavy lifting and probably should not have been so employed at the time of injury because of his age and general condition. I feel with the deformity improved, even with a stiff spine, he will be able to perform light work."

My diagnosis at that time was first osteoarthritis; second acute strain of low back.

My prognosis at the time was "Doubtful, although he may return to his former condition if above remedies are carried out. I feel his rating for permanent partial disability should be deferred until appropriate treatment has been tried."

Now, that was my report of February the 25th.

Then, on or about May 13th, 1931, I rendered this report:

"Mr. J. E. Braswell entered Garfield Hospital March 25. He was at rest in bed on a fracture bed until April 3. On this date a body cast was applied and he was discharged from the hospital on or about April 6. Patient wore the cast with comfort until May 4, when it was removed and a long back brace fitted. This brace he is now wearing.

I feel this patient has returned to his normal condition. There has never been any question but what the osteoarthritis was at the bottom of most of his trouble, and that back strain was simply a secondary cause. I think now that the strain symptoms have disappeared, and whatever difficulty he has is due entirely to the preexisting arthritis. Other than the wearing of the brace as a support, no further treatment is recommended.

This man could return to light duty such as a clerk in a store, but these duties should not compel him to lift heavy objects. A permanent partial rating of twenty-five per cent would, I believe, be fair.

There is no reason why I should see this patient further other than to adjust his brace should it require adjusting."

At the time that this report was rendered, he had been in the office and an examination had been made and his brace was checked and I felt that he had practically gotten rid of any symptoms that he might have had from an acute strain such as he described in lifting a box.

His spine was stiff, but he was stiff before. Any back showing that amount of osteoarthritis of long duration necessarily is a stiffened back.

82 (The witness at this time was referring to an x-ray plate which had been placed in the illuminated frame and inspected by the Deputy Commissioner and counsel for the respective parties.)

By the Deputy Commissioner:

Q. What date was this taken? A. This was on April 4th, 1930.

Here (indicating another x-ray photograph) is another view made on the same date.

Incidentally, these plates were taken at Garfield Hospital, through the out-patient department; he evidently reported in the clinic, in the out-patient department and the x-rays were taken there.

Here (indicating another x-ray plate) is the lateral view of him showing the intense amount of new bone production.

There is no question in my mind, after seeing any number of these cases, especially in these older men, that what happens with them, when they lift something is not so much strain on the joint alone, like you have a sprained ankle or wrist, but there is a definite fracture of these little vertebrae or protuberances and that causes pain, and there is no question but, in time, it quiets down.

Take a back of this kind, for instance. I have heard questions asked here and answers given.

83 In the first place we see hundreds of these cases with an enormous amount of arthritis that do not have any symptoms at that time because the blooming back was stiff and the vertebrae was held together so that they could not move, and it is only the motion of the thing that causes the pain. When a certain amount of fixation comes on, they seem to have pain. They do not really have any. We see a lot of these backs almost completely fused, and that is exactly what we do in a lot of these old sacroiliac strain cases, lumbo-sacro strains.

This man, looking at these plates, these two views in question, in my mind, the fundamental of the whole thing is that he has had this before, of course, and for a number of years. I believe him when he says he has not had any pain, but I do not believe him if he says his back has been flexible. He has had it so long that he necessarily must have had some limitation of motion.

As I said, he should never have been employed in the first place and should not be and never ought to have been employed in lifting.

His is the case where the ordinary lifting and pulling around would either produce a fracture here (indicating on the x-ray) or strain the joint.

He has a little thing here (indicating) which the x-ray man did not know as to what it was.

By Mr. McCabe:

84 Q. Just a moment, Doctor; you are explaining the x-rays here. Are you familiar with reading x-rays?

A. I most assuredly am.

Q. Have you taken— A. (interposing): I read every one.

Q. Of your own? A. Yes, I certainly do.

By Mr. Marshall:

Q. Have you anything further to add? A. The only thing I can add is that I feel, just simply seeing this man, without having examined him since May, but seeing him move around here and seeing him sit, he is so far improved, he is really better than I thought he would ever be, and I do feel he could do light duty, the same sort of duty of a man 64 years old, with this sort of a spine, should do.

A man 64 years old with a spine such as his is has no business lifting heavy weights.

Q. Would you say, Doctor, that the aggravation of the preexisting injury has been entirely overcome? A. I should say it was. I should say that anything he has now has been due, most probably, to the old condition, to the old osteoarthritic condition and that any strain that he might have had at the time, within this length of time, a year or more, has disappeared.

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Modification of Award on Nov. 22, 1934.

115 It is agreed by stipulation by both parties of interest that the claimant is not totally recovered from the injury sustained by him on 15th day of February, 1930, but that he still suffers some of the residual effects of the said injury, which are not totally disabling the claimant at this time. The respondent made request for modification of the award on the ground that there had been a change of conditions from those found in the original order;

116 namely, temporary total disability; and that his condition is now one of temporary partial disability. It is so found by this office that the condition of the claimant has changed from that of temporary total disability to a condition of temporary partial disability by reason of the said injury. In accordance with Section 8 (e) of the Act, he is entitled to a modification of this award when a proper showing is made of a change of condition from that found at this time.

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160 Dr. Frank E. Gantz, claimant's witness at hearing before Deputy Commissioner Cardillo, February 6, 1941.

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Direct Examination

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164 A. Well, in the first place he has unquestionably had arthritic changes before the original injury. There is no question about that at all. He suffered a low back strain which unquestionably aggravated his preexisting condition. With the cooperation of his employer he was able to go back and carry on a very limited type of work. That is the impression I had from talking with him and listening to him here this morning, and then doing the thing which isn't particularly heavy work. I would say a five-gallon can of kerosene would probably weigh around 35 or 40 pounds. The same amount of water would weigh that and kerosene is a lot lighter. Just merely lifting that down caused a breakdown in his back. I think if a man is able to carry on and offered a light type of employment, but certainly could not go in the competitive field and work with young, strong men.

Q. You are familiar, are you, from the description given today and from your own observation of the work required in an Atlantic & Pacific Tea store? A. Yes, sir.

165 Q. Any work which required lifting, could he do it? A. I don't think he could.

Q. Do you think that condition is permanent? A. There is no question about it at all.

Mr. McCabe: That is all.

Cross-examination

By Mr. Ewing:

Q. Doctor, you stated the last time you saw this man was on October 28, 1940. When was the first time you saw him, please, sir? A. I saw him at the time Dr. Courtney examined him in 1934. Dr. Courtney and myself at that time were officing together. I don't recall that I examined Mr. Braswell at that time, although I did take x-rays of him for Dr. Courtney.

Q. Were you familiar with his condition? A. Yes, sir.

Q. Over the period from 1934 to the time of your last examination, did you have occasion to be familiar with it? A. None whatsoever.

Q. In 1934 you took x-rays? A. Yes, sir.

Q. Did you take x-rays at the time of your last examination? A. No, I saw the x-rays taken by Groover,
166 Christie & Merritt, Dr. McPeak.

Q. Did you compare the x-ray which you took in 1934 with the x-rays taken in 1940? A. No, but I do have the 1934 x-rays.

Q. Dr. McPeak is here. I wonder, if, subject to their being properly identified later on, Dr. Gantz took the x-rays which he took in 1934 and which were taken in 1940 and let's see what the changes are. In order to facilitate the matter it so happens that both Dr. Talbot and Dr. McPeak are in the room and maybe we can all proceed faster so as not to take this up separately with each individual one if we could let them look at them and examine them now, and testify what they find when their turn comes to go on the stand.

Doctor, you have compared those taken in 1934 by you with the ones taken by Dr. McPeak in 1940? A. Yes, sir.

Q. You have compared those? A. Yes.

Q. The interpretation of x-ray pictures is a little hard for a layman to get at, so rather than try to examine you on it I would rather you state what the pictures show in 1934 and what those in 1940 show, and what changes, if any, have

taken place. A. They show a hypertrophic type of
167 arthritis at both times and there is probably a slight
increase in the more recent pictures over what they
were in 1934.

Q. Hypertrophic? A. Hypertrophic.

Q. What does that mean? A. A proliferated growing—

Q. Proliferative means getting worse? A. Yes. There
is some increase, not tremendous.

Q. Taking into account the fact in 1934 you knew he had
this arthritic condition and taking into account in 1934 his
age was some 68. Is that right? A. 68, approximately.

Q. He is now 74 years of age. State whether or not that
change which you mentioned is about the normal change you
would expect in a man of that age. A. I would expect just
about the same; yes, sir.

Q. Now, assuming you took x-rays of the man and it
showed his condition as your x-rays show, as the x-ray
shows in 1940, taking into account the man's age, state
whether or not the condition which you found of arthritis
would be of a disabling type or not. A. Would you read
that question?

Mr. Ewing: If I have asked it awkwardly I will try and
rephrase it, but suppose you read it.

(Pending question read.)

168 The Witness: That is a thing that is extremely
difficult about these cases. We sometimes see even
worse cases of arthritis than this that are picked up that
don't give any particular symptomatology.

By Mr. Ewing:

Q. Symptomatology means what? A. Complaints and
record of physical condition.

Q. I think it is fair to state, and if I am wrong, Mr. Mc-
Cabe, I would like for you to correct me so we can arrive at
the proper kind of question to ask an expert.

What I am concerned with is whether or not Mr. Bras-
well's present condition is a result of an injury itself in the

first place, or whether that was of such nature it would have gotten well or whether his present condition is the result of the arthritis with the proliferative changes, or whether it is due to old age or a combination, and if a combination, how it could be allocated one to another.

Can you give us your expert opinion on that?

A. I think that is a thing no one can say. That is, you can't come out and make a cut and dried division as to what is due to his arthritis and what is due to his trauma. My opinion would be that there is an interrelation, but where one starts and the other stops I am not able to tell.

Q. Would you be willing to give us your expert
169 opinion as to some percentage there? You have indicated that you feel there is some percentage and I just wonder if you would give us your opinion. A. I would have to say about 50-50.

Q. 50-50? A. Yes, sir.

Q. I notice in your report you use the statement that there is shown a calcification of the abdominal aorta. That simply means a hardening of the man's artery? A. That is correct.

Q. In the stomach region? A. Abdominal section.

Q. Hardening of the arteries in a man of this age is not an unusual thing? A. No.

Q. State whether or not that would be in any way connected with back strain. A. No, I don't believe it would.

Q. Hardening of the arteries get to the point where they, themselves, are disabling, do they not? A. Oh, yes.

Mr. Ewing: That is all.

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171 Dr. John Allen Talbot at February 1941 hearing.
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Direct Examination

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174 Q. Had you seen him in that interim? A. No, I have no record of having seen him between this period of time.

Q. At the time you had Dr. McPeak take more pictures which are here? A. Yes, sir.

Q. October 4, I believe. A. October 4th, that is right.

Q. Will you just state what your findings were? A. He reported in the office October 4, 1940 and stated that he went back to duty on January 11, 1932 and was working as relief clerk in various stores of the A. & P. Tea Company. On August 13, 1935, he lifted a can of kerosene and had a return of back pain. The attack lasted about three weeks. On

September 30, 1935 he returned to duty, working
175 one day, and has never been employed since.

Your attention is called to previous reports which you undoubtedly have in your file. It should be remembered that this man has an old osteoarthritic condition involving the spine. He is an elderly man, appearing somewhat older than his actual age. Motions of the spine are restricted. He has a flat lumbo-sacral spine. He stands well with the spine partly flexed at the hips and in attempting to bend forward all motions are from the hips. He complains of tenderness over the entire spine. Motions of his hip joints and knees are what would be expected in an older man. They are limited. In view of the fact that no recent x-rays have been taken, I deemed it advisable to have them as a check and this was done at the office of Drs. Groover, Christie & Merritt. The film shows general osteoporosis or thinning out of the calcium of the bones with proliferative changes involving the bodies.

The films also show a moderate scoliosis in the mid-lumbar region. In addition to this there is sclerosis of the abdominal aorta. All of these findings checked with the physical findings and are, of course, what we would expect to see in a man of this age.

I formed an opinion at that time. I said, "It should be understood that a back of this character in a man of his age
is prone to strains from time to time. The symptoms
176 from these strains necessarily last a few weeks
longer than the same strain in a normal individual
with a normal back and a younger individual, but to state

that he is totally disabled at this time due to the back strain is far-fetched, to say the least. This man's disability is primarily due to age. Incidentally his arthritis, whatever aggravation of his chronic condition he has, that can be attributed to strain is very little, I should say. Certainly not more than 25 per cent of his disability can be directly or indirectly attributed to the back strains he had over the past few years. The rest of his disability is due to age and bone and joint changes."

Now, we have here a man who is 74 years old, who in 1931 exhibited hypertrophic changes. Those changes were not of recent origin. They had been coming on over the years. In 1929 he had some difficulty with his back. Undoubtedly he began to stiffen up at that time. Now, it is reasonable to suppose that an individual of this age, with this normal for him osteoarthritic changes could not carry on as a young man in competitive work in the store.

Now, he has a strain of his back. Necessarily we would expect to see it prolonged. He goes back to duty, light duty possibly, yes. He has another strain. Now, it is almost a physical or mental impossibility to say that this man is
 177 totally disabled because of these strains, because they are not. If we examined this man without any history at all, just simply got him up and examined him and looked at the x-rays, we would see from the clinical picture and the x-rays that we have enough to warrant a stiff back.

Now, we have a strain. I admit it is difficult to evaluate the strain part and the pathology in this individual, but I am fairly positive in my own mind. I heard Dr. Gantz' testimony, but it isn't any 50-50 proposition by any means. None of these injuries were of severe character. None of them aggravated the condition. There is no aggravation of this thing. It is simply a question of a man with a back that is old and he has got no business working at a hard trade. It is an unfortunate sort of situation, I will admit, and it is a thing that is going to prevent a lot of these older men

from obtaining jobs. The employer is possibly going to hesitate to take a man who has any stiffness of his back because of this very fact, and I say in all fairness to Mr. Braswell, and I have come to know him in the treatment of him, I think in all fairness to him and in fairness to his employer I should say that 25 per cent is a very fair estimate of his disability that can be attributed not to one injury but numerous little injuries he has had, that a great portion of his disability is due to things we have no control over, that the injury has nothing to do with what-
178 ever.

Q. You said one thing that interested me. I would like to ask you about it—"due to a number of little injuries." You heard the statement made by Dr. Gantz that Mr. Braswell was hurt lifting a five-gallon can of kerosene? A. I made that statement.

Q. In a man who did not have this preexisting arthritic condition, would he or not have received these numerous small injuries which you mentioned from going about normal and not unusually heavy duty such as that? A. I tried to make that clear because of his preexisting condition he is prone to back strain, a thing that would not bother an ordinary individual. If every individual lifting a five-gallon can of kerosene got a back strain we would have a lot of back strains, and if this man was younger undoubtedly it would not be necessary to be here because he would probably have been well long ago.

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183 Redirect examination.

By Mr. Ewing:

Q. One question. Assuming you examined a man in 1931 such as you did Mr. Braswell and saw the x-ray of his then condition and got a case history from him indicating pain going back for two years prior to that, under the circumstances regardless of an injury in your opinion ten years later that man would be able to carry on duties which are

necessary to do in working in a grocery store, that is, the average duties, or whether that condition coupled with his age of another 10 years would be such that would be because he could not work? A. I think a man of his age with his type of back and with the general arteriosclerosis certainly should not be working. I don't believe this man can work, and certainly not in a competitive job such as a clerk
 184 in a store, but I think it is due to his age and to his arthritis.

Mr. Ewing: That is all.

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Letter written August 6, 1931, to the Employer by their attorneys:

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189 "It is my understanding Mr. Braswell finally stopped work on August 12, 1935 and you have been paying him \$11.54 since that time. If you have done nothing further your maximum liability would be payment of such compensation for a total of five years. Mr. Braswell would always have the right to appeal to the Compensation Commission for the purpose of showing he was now totally disabled as a result of his injury in which event if he proves such fact your maximum liability would amount to \$7,500."

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No. 8011

**In the United States Court of Appeals for the
District of Columbia**

**THE GREAT ATLANTIC & PACIFIC TEA COMPANY, A
CORPORATION, APPELLANT**

v.

**FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES' COMPENSATION COMMISSION, AND
JAMES E. BRASWELL, APPELLEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

BRIEF AND APPENDIX ON BEHALF OF APPELLEES

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**In the United States Court of Appeals
for the District of Columbia**

No. 8011

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, A
CORPORATION, APPELLANT

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES' COMPENSATION COMMISSION, AND
JAMES E. BRASWELL, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF AND APPENDIX ON BEHALF OF APPELLEES

COUNTER STATEMENT OF CASE

This case arises under the provisions of the District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, Chapter 612, Section 1; D. C. Code, 1929, Title 19, Chapter 2, Section 11), making applicable to employees in certain employments in the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C., Title 33, Chapter 18, Section 901 *et seq.*), hereinafter referred to as the "compensation law."

The appellee, James E. Braswell, injured his back on February 15, 1930, while employed as a grocery clerk in one of the stores of the appellant, The Great Atlantic & Pacific Tea Company, in the District of Columbia. A claim for compensation was filed with the deputy commissioner administering the District of Columbia workmen's compensation law. Based on evidence adduced at a hearing before him on August 26, 1931, the deputy commissioner found that the employee was totally disabled as a result of the injury and accordingly awarded compensation in the amount of \$11.54 each week, which was two-thirds of the employee's average weekly wage, said compensation to continue until further order. This award was contained in a formal compensation order dated August 31, 1931, filed under the statute (Appellees' App. 35).

The appellant paid compensation pursuant to this order until January 11, 1932, at which time the employee, pursuant to an arrangement with his employer, returned to work at one of the stores with the understanding that he would do no heavy lifting or other heavy work that might affect his back, which was still disabled. In view of payment of full wages no compensation was paid while the employee was working. Under this arrangement the employee was able to work for the employer until August 13, 1935, although he had considerable pain in his back and was compelled to rest during the day (Appellees' App. 53-56).

In November 1934 the employer requested a hearing for the purpose of seeking modification by the deputy commissioner of the order of August 31, 1931,

on the ground that the employee was no longer totally disabled. No testimony was taken upon the application, the deputy commissioner having made a finding in a compensation order filed November 22, 1934, that since January 11, 1932, the date the employee was re-employed, he was temporarily partially disabled, but that there was no occasion at that time for determining loss of wage-earning capacity in view of the fact that the employer was paying the *full wages* which the employee received prior to his injury and was giving him selective work (Appellees' App. 39, 43-46).

On August 13, 1935, while the employee was working (and the only clerk in the store), a customer entered and ordered five gallons of kerosene. The employee looked for someone to help him, but as there was no one he undertook to lift the loaded can of kerosene from a hook by himself and immediately felt a pain in his back and a recurrence of his original disability followed. He told the superintendent about it the same day and the next morning *was unable to get out of bed*. He returned to work one day, on October 1, 1935, and on the same day a representative of the employer told him not to return to work until he heard from them as they wanted to give him a physical examination. This was done by a doctor for the employer. The employee heard nothing further from the employer and on August 29, 1935, the employer notified the deputy commissioner that it was resuming compensation from August 13, 1935, at \$11.54 per week, *which was the previous rate paid for total disability* (Appellees' App. 56-60). Compensation was

paid for total disability at this rate until *August 31, 1940*, when the employer served notice that compensation payments had been discontinued. The employer then requested a hearing, claiming that the employee's disability was due to causes other than the injury he sustained, and that it had paid compensation for five years and was not obligated to pay further under the provisions of section 8 (e) of the compensation law, which relates only to *partial* disability (U. S. C., Title 33, Section 908 (e)) (Appellees' App. 47-48).

A hearing was held before the deputy commissioner on February 6, 1941, and after taking the testimony of the employee and two physicians, the deputy commissioner filed a compensation order on March 11, 1941, in which he found that the employee was totally disabled from August 13, 1935, and awarded compensation at \$11.54 per week from that date (Appellees' App. 30).

The employer instituted a proceeding in the District Court of the United States for the District of Columbia for a judicial review of that order, seeking to have it set aside upon the ground that it was not in accordance with law. A joint motion to dismiss the complaint was filed on behalf of the deputy commissioner and James E. Braswell, the employee. The cause came on for hearing before Mr. Justice Jennings Bailey who, in a memorandum filed June 30, 1941, stated: "I think that there was substantial evidence in support of the findings of the deputy commissioner and the motion to dismiss should be sustained" (Appellant's App. 6). An order was entered on the 9th

day of July 1941, dismissing the complaint, and it is from that order the present appeal is taken (Appellant's App. 7).

QUESTIONS INVOLVED

The only questions for the determination of this Court appear to be in substance (1) whether the findings of fact of the deputy commissioner in the compensation order of March 11, 1941, to the effect that the employee is suffering total disability as a result of the injury he sustained, complained of by appellant, are supported by competent evidence, (2) whether appellant is entitled to have the question as to whether Braswell's disability is due to old age and arthritis and not to the injury sustained redetermined and readjudicated, and (3) whether the appellant has paid compensation to the employee for temporary partial disability for a period of five years and is therefore relieved of further liability by reason of the limitation in section 8 (e) of the compensation law (33 U. S. C., sec. 908 (e)), which provides that compensation for temporary partial disability "shall not be paid for a period exceeding five years."

SUMMARY OF ARGUMENT

1. (a) That the findings of fact of the deputy commissioner in the compensation order filed March 11, 1941, that Braswell, the injured employee, suffered total disability from August 13, 1935, and continuing thereafter as the result of the injury he sustained on February 15, 1930, complained of by appellant, are supported by competent evidence and under the law should therefore be regarded by the Court as final and conclusive.

(b) That the finding of the deputy commissioner that Braswell is suffering total disability as the result of the injury he sustained is supported by the testimony of Braswell and of Dr. Gantz.

(c) That, moreover, Deputy Commissioner Cardillo properly awarded compensation to Braswell in the compensation order of March 11, 1941, complained of by appellant, on the basis of total disability, because (1) appellant recognized its liability to pay compensation on such basis in that beginning August 13, 1935, appellant voluntarily resumed the payment of compensation to Braswell at the full rate for total disability of \$11.54, and (2) because the contention of appellant that Braswell's disability is due to old age and arthritis and not to the injury he sustained was adjudicated in the prior compensation order filed by former Deputy Commissioner Hoage on March 31, 1931; that such issue is *res adjudicata* and appellant is not entitled to have this issue redetermined and readjudicated, the original compensation order having become final and conclusive under the provisions of section 21 (a) of the compensation law (33 U. S. C., sec. 921 (a)) by reason of the fact that appellant failed to institute proceedings for judicial review of said order as provided for under the provisions of subdivision (b) of section 21 (33 U. S. C., sec. 921 (b)).

2. That the record shows that appellant has not paid compensation to Braswell for *temporary partial* disability for a period of five years, appellant having voluntarily resumed the payment of compensation to him on the basis of total disability on August 13, 1935;

that, therefore, the five-year limitation in section 8 (e) of the compensation law (33 U. S. C., sec. 908 (e)), relied upon by appellant, has no application in this case; that, moreover, the deputy commissioner had ample authority under section 22 of the compensation law (33 U. S. C., sec. 922) to review the case and award compensation for total disability, even admitting, *arguendo*, that appellant had paid compensation to Braswell for a period of five years.

ARGUMENT

I

(a) That the findings of fact in the compensation order of March 11, 1941, to the effect that Braswell is suffering total disability as a result of the injury he sustained, are supported by the evidence and should therefore be regarded by the court as final and conclusive

GENERAL PRINCIPLES

Before discussing the evidence in this case, it may not be inappropriate to invite the court's attention to the following well-established principles of compensation law:

The compensation law should be liberally construed in favor of the injured employee or his dependent family; *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris*, 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America v. Cardillo, deputy commissioner*, 70 App. D. C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.*, 71 F. (2d)

810 (C. C. A. 4), certiorari denied October 8, 1934, 293 U. S. 581.

The findings of fact of the deputy commissioner *supported by evidence* should be regarded as final and conclusive and not subject to judicial review; *South Chicago Coal & Dock Co., et al. v. Harry W. Bassett, deputy commissioner*, 309 U. S. 251 (1940); *Del Vecchio v. Bowers*, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162 (1933); *Crowell, deputy commissioner v. Benson*, 285 U. S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner*, 286 U. S. 528 (1932), 71 C. J. 1297, sec. 1268.

The deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence; *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner*, 18 F. Supp. 729 (D. C. N. Y. 1937); *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D. C. Me. 1929); *Jarka Corporation of Philadelphia v. Norton, deputy commissioner*, 56 F. (2d) 287 (D. C. Penn. 1930); *E. S. Booth v. Monahan, deputy commissioner*, 56 F. (2d) 168 (D. C. Me. 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (D. C. Wash. 1930).

With these principles in mind let us examine the evidence to determine whether it supports the finding of fact in the deputy commissioner's compensation order of March 11, 1941, that Braswell is suffering total disability as the result of the injury he sustained.

In the original compensation order dated *August 31, 1931*, the deputy commissioner found that Braswell was injured on February 15, 1930, under the following circumstances:

* * * while in the employ of the employer as a clerk in a store at 1801 Connecticut Avenue, NW., in the District of Columbia, sustained personal injury which arose out of and occurred in the course of his employment, and resulted in his disability; that while so employed and while lifting a crate of groceries, he suffered a strain in the lower part of his back on the right side, causing immediate pain (Appellees' App. 36).

These findings of fact are now final and are not now subject to review, although appellant seeks to attack them.

JAMES EDWARD BRASWELL, the injured employee, testified at the hearing of February 6, 1941, that he sustained an injury in 1930 (Appellees' App. 53), and was paid compensation for disability resulting from said injury from date of injury to January 10, 1932, at which time he returned to his employment with the understanding that he would do only light work (Appellees' App. 54); that he waited on customers but did no heavy lifting; *that prior to the injury of 1930 he could perform the full duties of his job, which consisted of handling anything from a two-pound box of cocoa to a two-hundred-and-fifty-pound bag of potatoes*; that he had no difficulty in performing his duties prior to the injury; that after he returned to his employment in 1932 he did not do as much lifting

as he had done prior to the injury (Appellees' App. 55, 56); that in August 1935 a customer came in the store desiring to purchase five gallons of kerosene; that he hung the can up on the hook and then proceeded to fill the can; that in lowering the can he hurt his back again; that he thereafter suffered considerable pain in his back, but continued to work until quitting time; that he did not return to work the next day (Appellees' App. 57); that he did not attempt to perform any work thereafter until October 1, 1935, when he returned to his employment and worked *only one day*; that the same day Mr. Morgenthau, superintendent of The Great Atlantic & Pacific Tea Company, called at his home and advised him not to return to work until he, Braswell, heard from The Great Atlantic & Pacific Tea Company; that the company desired him to undergo a physical examination (Appellees' App. 58); that he underwent such an examination by Dr. Edmonston; that he never heard anything from the Company (Appellees' App. 58); that he received form DCCA 306, dated August 29, 1935, entitled "Notice to the deputy commissioner that the payment of compensation has begun without awaiting an award," which was signed by the employment office manager; that said form was received on or about October 15, 1935 (Appellees' App. 59); *that thereafter compensation was paid to him at the full rate of \$11.54 per week for total disability* (Appellees' App. 59, 60); and that compensation payments were made on such basis until August 31, 1940; that during the period between 1932 and August 1935 he worked for the company *under considerable difficulty*; that he suffered

continuous pain which was very intense at times (Appellees' App. 60); that he suffered continuous pain in his back and right leg (Appellees' App. 61); that if he had any pre-existing condition of arthritis prior to the injury of 1930, *he did not know of it and it did not affect his work in any manner*; that at the time of injury his wages were \$18 per week and when he returned to work in 1932 he was paid his regular wage of \$18 per week (Appellees' App. 61).

Dr. FRANK E. GANTZ, surgeon, testified on behalf of the claimant that he examined claimant on October 28, 1940; that he received a history that on February 17, 1930, while carrying a box of groceries for a customer, claimant suffered a severe pain in the right hip; that he later returned to work performing light duties, and on August 13, 1935, he was unable to continue his work following the lifting of a can of kerosene; that patient complained of pain in the low back and right hip (Appellees' App. 62, 63).

Dr. Gantz's diagnosis and medical opinion were as follows (Appellees' App. 63):

Diagnosis and opinion: This represents a case where a man with a preexisting spinal arthritis with proliferative changes suffered an injury to his low back at approximately the age of 64. During most of this time from 64 to 74 years, he has been incapacitated for any type of work. We find him at the age of 74 not having worked for five years and probably in worse physical condition after five years than he was at the time of his most recent back strain. At the time of his original injury, *he unquestionably had a ground work laid for his permanent disability in*

that he had unquestionably a spinal arthritis. *At the present time, he is totally disabled for carrying out any type of gainful occupation and has been since the date of his second injury. I believe that this is a total permanent disability.* [Italics supplied.]

Dr. Gantz was asked on cross-examination whether or not Braswell's present condition was the result of the injury itself or whether it was the result of the arthritis with the proliferative changes or to old age or a combination thereof, and if a combination, how it could be allocated one to the other. Dr. Gantz answered this question as follows: "*I think that is a thing no one can say. That is, you can't come out and make a cut and dried division as to what is due to his arthritis and what is due to his trauma. My opinion would be that there is an interrelation but where one starts and the other stops I am not able to tell*" (Appellant's App. 21). On recross-examination Dr. Gantz testified that when a person has a back strain imposed upon a pre-existing arthritis, *pain oftentimes persists from the original back strain and continues on through the years; that the present case is a typical one and that the pain can become worse as time goes on, and that there is no question but that lifting or bending can aggravate the condition* (Appellees' App. 64). He further testified that claimant could not carry on as a grocery clerk (Appellees' App. 64).

Dr. JOHN ALLEN TALBOT, orthopedic surgeon, testified on behalf of the employer, among other things, that he examined the claimant in the early part of 1931 (Appellant's App. 13); and that he saw him

again on October 4, 1940 (Appellees' App. 65); that examinations revealed that claimant had an old osteoarthritic condition involving the spine; that recent X-rays show a general osteoporosis or thinning out of the calcium of the bones with proliferative changes involving the bodies (Appellant's App. 22); that in his opinion claimant's disability is due primarily to his age; that not more than 25% of the disability can be directly or indirectly attributed to the back strains he has sustained (Appellant's App. 23), but that it is *very difficult* to evaluate the disability due to the injury and disability due to arthritis (Appellant's App. 23); that with a back of the type the claimant had the injury he sustained in 1930 is apt to produce pain "*and it is apt to prolong beyond normal*"; that it is possible that such pain would *continue through the years* (Appellees' App. 65); that his opinion in 1940 is the same as it was in August 1931, namely, that this man had a 25% permanent partial disability (Appellees' App. 65); *that in his opinion the claimant cannot work and certainly not in a competitive job such as a clerk in a store* (Appellant's App. 25).

(b) Award for total disability proper

It will be seen from the foregoing narration that the contention of appellant that Braswell's disability is not due to the injury he sustained but is due solely to his old age and proliferative osteoarthritis of the spine is without merit. Appellant concedes that Braswell is suffering permanent total disability but contends that such disability is due to causes other than the injury he sustained. The only basis we find in the

record for such a contention is the testimony of Dr. Talbot that Braswell's disability is due primarily to his age and that not more than 25% of the disability can be attributed to back strains he has sustained. (Incidentally, compensation is *not* payable on the basis of a percentage of compensation for total disability equivalent to the same percentage of physical impairment, but on loss of wage-earning capacity.) Dr. Talbot admitted, however, that it was very difficult to evaluate the disability due to the injury and the disability due to arthritis. Dr. Gantz testified that Braswell's disability was due to a combination of the effects of the injury and the results of preexisting arthritis, but that no one could allocate one to the other. Moreover, Braswell testified that prior to the injury he could perform the full duties of his job which consisted of handling anything from a two-pound box of cocoa to a 250-pound bag of potatoes; that since the injury he has suffered continuous pain and disability, and that since August, 1935, at which time appellant voluntarily resumed the payment of compensation to him on the basis of total disability, he has not been able to work.

It is submitted that the evidence supports the findings of fact in the compensation order complained of by appellant. This is a type of case where your Honors have stated that the deputy commissioner in weighing the evidence may give weight to "the common sense of the situation." *Avignone Freres, Inc. v. Cardillo*, 117 F. (2d) 385; *Commercial Casualty Company v. Hoage*, deputy commissioner, 75 F. (2d)

677. Furthermore, in determining the extent of an employee's disability the courts have repeatedly held that the deputy commissioner may disregard the opinion of physicians and rely upon his own observations and judgment. See cases cited above under the heading "General Principles."

If appellant's theory should be sustained, an employee, elderly or otherwise, sustaining injury would be denied compensation even though such employee should be unable to work because of the effects of the injury, merely upon the basis of medical evidence indicating that an unseverable part of the disability may be due to underlying pathology which the injury aggravated. Any such rule would obviously conflict with the rule of liberality of construction so often stressed by this Court and other courts in construing the compensation law and would be out of harmony with the weight of authority which holds the employer liable for all consequences of injury, including aggravation of preexisting disease.

The employer accepts the employee subject to physical infirmities and anomalies (*Pacific Employers' Ins. Co. v. Pillsbury, deputy commissioner*, 61 F. (2d) 101 (C. C. A. 9, 1932)), and the testimony of the injured employee himself is sufficient to sustain an award in his favor; *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C. C. A. 3, 1931).

If Braswell had some *nondisabling* degree of pre-existing arthritic condition, the injury he sustained on February 15, 1930, *aggravated* such condition resulting in a long period of disability (which has not as yet

ceased) for which the plaintiff paid him compensation. The rule is universally recognized in compensation law and has been specifically recognized in this jurisdiction that the employer is liable for disability resulting from the aggravation, acceleration, or lighting up of a preexisting or latent infirmity of an employee; see *Hoage, deputy commissioner v. Employers' Liability Assurance Corporation, Ltd.*, 62 App. D. C. 77, 64 F. (2d) 715, certiorari denied, 54 S. Ct. 54, the so-called *Kerper* case, and 71 C. J. 603, section 358.

The fact that a portion of Braswell's present disability may be due to aggravation of underlying arthritis or any other diseased condition common to many persons is immaterial. The injury has resulted in a condition of total disability. In the case of *New Amsterdam Casualty Company v. Cardillo, deputy commissioner*, 71 App. D. C. 172, 108 F. (2d) 492, which involved an injury to an elderly employee resulting in a hernia, this Court said:

Of course, the employer is not responsible for all the ailments which his employees may have, but he is required to provide compensation for disabilities caused by injuries arising out of and in the course of the employment, *even though the extent of the disability is partly due to the employee's physical condition.* [Italics supplied.]

(c) Question whether Braswell's disability is due to causes other than the injury he sustained has been previously adjudicated and cannot properly be raised in this case

This is the *second time* that appellant has sought to have the deputy commissioner find that Braswell's dis-

ability is due to advanced age and hypertrophic arthritis rather than to the injury he sustained. This same contention was urged by appellant *in the original hearing* in this case on August 26, 1931, before former Deputy Commissioner R. J. Hoage. Counsel for the employer stated at that hearing that Braswell was not suffering from "any injury or from any condition due to an injury received while in his employment" (Appellees' App. 53). Deputy Commissioner Hoage in his compensation order filed August 31, 1931, found that there was no merit to appellant's contention that Braswell's condition was due to causes other than the injury he sustained on February 15, 1930. The deputy commissioner specifically found in that order as follows (Appellees' App. 36):

* * * that the employer denies further liability for the payment of compensation subsequent to August 26, 1931, on the ground that the disability which the claimant was suffering on August 26, 1931, was due to other causes than the injury of February 15, 1930; *that the claimant has been totally disabled as a result of the injury sustained on February 15, 1930, continuously from the date of the injury to August 26, 1931, and that said total disability as a result of the injury above set forth still continues.* [Italics supplied.]

In connection with the above point the appellees respectfully contend that the question whether Braswell's disability is due to causes other than the injury he sustained was adjudicated in the first compensation order filed, referred to above; that appellant failed to

institute proceedings for judicial review of said order and that it therefore became final and conclusive under the provisions of section 21 (a) of the compensation law (33 U. S. C., sec. 921 (a)); that this question is now *res adjudicata* and cannot properly be raised in this proceeding. In support of this contention the appellees invite the Court's attention to the opinion of the United States circuit court of appeals for the ninth circuit in the case of *Pillsbury, deputy commissioner v. 'Alaska Packers' Association*, 85 F. (2d) 758 (1936), reversed on other grounds, 57 S. Ct. 682, where it was said:

Section 21 of the act (33 U. S. C. A. section 921) provides that a compensation order shall become final after 30 days, unless proceedings for its abrogation are instituted in the District Court within that time. *Associated Indemnity Corporation v. Marshall* (C. C. A. 9) 71 F. (2d) 235, 236; *Id.* (C. C. A.) 71 F. (2d) 420. In view of that provision, and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned 20 months after the original compensation order would, we think, result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act.

That the purpose of the act is to bring about "final awards and termination of litigation" after 30 days seems to have been recognized in another case by the District Judge who tried the instant suit. *United Fruit Co. v. Pillsbury* (D. C.) 55 F. (2d) 369, 370.

Accord:

Shugard v. Hoage, deputy commissioner, 67 App. D. C. 52, 89 F. (2d) 796 (1937);

Mille v. McManigal, deputy commissioner, 69 F. (2d) 644 (C. C. A. 2, 1934);

Campbell v. Lowe, deputy commissioner, 10 F. Supp. 288 (D. C. N. Y., 1935);

W. R. Grace & Co. v. Marshall, 56 F. (2d) 441 (D. C. Wash., 1931);

United Fruit Company v. Pillsbury, deputy commissioner, 55 F. (2d) 369 (D. C. Calif., 1932);

Associated Indemnity Corporation, et al. v. Marshall, deputy commissioner, 71 F. (2d) 235 (C. C. A. 9), rehearing denied July 19, 1934, 71 F. (2d) 420.

In *W. R. Grace & Co. v. Marshall, deputy commissioner, supra*, the court, refusing to consider an attack on a prior final order, said:

As to the first question presented (which related to the cause of the employee's disability), there having been *no review of the first compensation order* under section 21 of the act (44 Stat. 1436, 33 U. S. C. A., sec. 921) *the matter is not open to review*, and the only question for the deputy commissioner's consideration upon the third hearing *was as to whether there had been any change shown, subsequent to the previous hearing, in the condition of the claimant*. Section 22 of the Act (44 Stat. 1437; 33 U. S. C. A., sec. 922). [Italics supplied.]

If appellant had any reason to believe that Braswell's condition was due to arthritis or old age and not to the injury he sustained, it should have instituted proceedings for judicial review of the compensation order filed on August 31, 1931, when the question was first adjudicated. Having failed to institute such proceedings the said compensation order became final

and conclusive, and appellant was not entitled to have the same question re-adjudicated on the basis of the evidence adduced at the hearing before Deputy Commissioner Cardillo on February 6, 1941. At the time of that hearing this question was *res adjudicata*.

II

Section 8 (e) of the compensation law (33 U. S. C., sec. 908 (e)) does not apply

Section 8 (e) (33 U. S. C., sec 908 (e)) provides as follows:

Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

Appellant contends that it had paid compensation to Braswell for temporary partial disability for a period of five years and therefore it is relieved of the payment of further compensation by reason of the five-year limitation in section 8 (e), quoted above. There is obviously no merit to this point because the record clearly shows that plaintiff *has not paid compensation to Braswell for temporary partial disability for a period of five years*. The record shows that Braswell was paid compensation for *temporary total* disability at the rate of \$11.54 per week from Feb-

ruary 16, 1930, the date following the injury, to and including January 10, 1932; that on January 11, 1932, Braswell was given selective light employment by the employer and was paid his full salary of \$18 a week—although admittedly disabled—and that he continued in such employment (without workmen's compensation benefits) until August 13, 1935, *a period of three years, seven months, and two days*; and that on August 13, 1935, the employer, without an award and without controversy, resumed the payment of compensation to Braswell for *total disability* at the full rate of \$11.54 per week, pursuant to section 14 (a) of the compensation law (33 U. S. C., sec. 914 (a)), which provides as follows:

Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

Since the employer voluntarily admitted liability for the maximum weekly compensation payable to Braswell, there was no necessity for a hearing or a further compensation order in August 1935. By continuing payment of compensation beginning August 13, 1935, at the full rate, the employer thereby admitted a change in the character and quality of disability from temporary partial disability (as found earlier by the deputy commissioner) to temporary total disability, thereby changing entirely the basis for payment of compensation, automatically removing the five-year limit. This change could otherwise have been accomplished upon application by the *employee*

and a new compensation order with appropriate findings, but as pointed out above this was unnecessary as the employer pursuant to the Act paid compensation voluntarily. Any other view would admit of the situation that the employee had been lulled into the belief that his employer recognized his temporary total disability and therefore that it was unnecessary for the employee to seek modification of the award to accomplish a change in the character and quality of disability from temporary partial to temporary total, and after having given the employee this false sense of security that the employer had waited until the five-year period had elapsed before springing upon the employee its contention that during all this time the disability was not that for which it had paid compensation but of a different character and quality of disability, namely, temporary partial disability, as earlier found by the deputy commissioner—the employer thus seeking to rely upon the earlier compensation order of the deputy commissioner (finding temporary partial disability) without accepting the consequences of its own voluntary act. Thus, the employer seeks to benefit by a practice or course of conduct hardly consistent with justice. The deputy commissioner expressed surprise (Appellees' App. 66) upon being advised of this, the employer's contention.

Payments of compensation made subsequent to August 13, 1935, were for total disability. Even assuming, for the sake of argument, that some part of the employee's wage of \$18 per week from *January 11,*

1932, to August 13, 1935, was "compensation" (a difficult assumption), it will be seen that appellant has not paid compensation for temporary partial disability for a period of five years and the limitation in section 8 (e), referred to above, clearly has no application in this case.

The attention of the Court is invited to the statement of the deputy commissioner at the hearing before him on February 6, 1941, with respect to the nature of the payments made subsequent to August 13, 1935. The deputy commissioner stated (Appellees' App. 66):

I will state in conclusion that it is a complete surprise to this office that payment of compensation has been made since August of 1935 was recently considered to be payment of partial disability rather than temporary total. The reason is when that notice was received it indicated payment had been *made at the full rate of \$11.54* which was the rate of compensation upon which the first award was based, *of temporary total disability*, and further, there appears in the file a memorandum from the same Claims Examiner who handled the case, he discussed with the then Deputy Commissioner, Mr. Hoage, the necessity of establishing the wage-earning capacity, and according to the notation of the Examiner, Mr. Hoage, then Deputy Commissioner, notified the Examiner that it was not necessary to take that action in the case *because it appeared compensation was being paid for temporary total disability*. That memorandum is dated Feb-

ruary 11, 1937. So that I merely state that it was assumed or presumed that payments were *being made for temporary total disability*. [Italics supplied.]

Moreover, even admitting, *arguendo*, that appellant had paid compensation to Braswell for temporary partial disability for a period of five years, the deputy commissioner had ample authority under the provisions of section 22 of the compensation law (33 U. S. C., sec. 922), to review this case and to award compensation for total disability upon finding that there had been a change in the employee's condition. The Court will note from the stipulation entered into by the parties at the hearing on November 13, 1934, with respect to Braswell's returning to work at light employment, that such stipulation was made with the distinct understanding that the deputy commissioner would have the right to review the case at any time there might be a change in the employee's condition (Appellees' App. 44, 45).

CONCLUSION

Appellant apparently relies upon the case of *Grays Harbor Stevedore Co. v. Marshall*, 36 F. (2d) 814. The appellees also rely upon this case. This was a case in the district court for the western division of Washington. The court merely held in that case that the evidence did not support the finding that the employee was totally disabled in respect to any and all employment. The court stated that the only evidence in the case on that point was scanty, ambiguous, indefinite,

and uncertain in respect to the elements of effect, continuity and time and that "neither expressly nor by reasonable implication does it appear that the employee has been continuously or at all totally disabled in respect to any and all employment." Surely a reading of the record in the present case will indicate the question of disability relating to the injury for any and all employment from the time of the employee's injury to the date of the award was exhaustively gone into, and that the evidence clearly supports the award complained of by appellant.

In *Grays Harbor Stevedore Co.*, the court reiterates the principle, relied upon by appellees, that "In so far as it is urged that the employee's previous diseased condition abates compensation, in part at least, it is without warrant in statute, which contains no exception in that behalf."

It is noted that appellant states at page 8 of its brief that both doctors found that Braswell's condition is one of *permanent* total disability as distinguished from *temporary* total disability as found by the deputy commissioner in his order. The deputy commissioner had the right, of course, to use his judgment in determining whether there was any prospect of improvement, but even if the finding had been of *permanent* total disability instead of *temporary* total disability, *the rate of compensation in either case is the same*, namely \$11.54 per week, and the total amount which the employer might have to pay is the same in either case, namely, \$7,500. A finding of permanent total

disability instead of temporary total disability would not affect the rights of the parties to any extent whatever, and any error of the deputy commissioner in this respect, which of course is not admitted, would clearly be harmless and could not possibly affect the questions before your Honors.

It is noted that appellant emphasizes the words "substantial evidence" in its brief, page 5, as though the evidence required to sustain the findings of fact in a compensation order must have some special probative force or some qualitative or quantitative substance beyond that which the term "evidence," as used in its legal significance, connotes. We point out that that the statute does not require that the evidence supporting findings of fact must have any particular or significant attributes, quantitative or qualitative. The appellant is merely trying to rest upon an adjective instead of the record, possibly in the hope that by the use of a relative qualifier the employee's evidence may reflect less probative value. The Supreme Court in the cases before it on the subject did not attempt to interpolate the qualifier "substantial." In *Crowell v. Benson*, 285 U. S. 22, the Court said:

* * * There can be no doubt that the Act contemplates that, as to the questions of fact arising with respect to the injuries to employees within the purview of the Act, the findings of the deputy commissioner, *supported by evidence* and within the scope of his authority shall be final. [Italics supplied.]

In *Del Vecchio v. Bowers*, 296 U. S. 280, the Supreme Court said "The only matter for decision was whether the affirmative finding was *supported by evidence*. It is clear that it was so supported and that the court should, therefore, not have set aside the deputy commissioner's order." [Italics supplied.]

In *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162, the Supreme Court said: "and when the deputy commissioner, * * * makes such determination his findings of fact *supported by evidence* must be deemed conclusive." [Italics supplied.]

In the case of *South Chicago Coal and Dock Company v. Bassett*, 309 U. S. 251, the Supreme Court said: "Hence the Court of Appeals correctly ruled that his finding, if there was *evidence to support it*, was conclusive." [Italics supplied.]

If Congress had intended that all findings of fact of the deputy commissioner in support of a claim were to be based upon *substantial* evidence, it no doubt would have stated so as it did in section 20 of the compensation law (33 U. S. C., sec. 920), which relates to the evidence burden of the *employer* and which reads as follows:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of *substantial* evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. [Italics supplied.]

In the bill of complaint filed in the lower court (paragraph 5) appellant raised a question relating to the application of the provisions of section 8 (f), (1) and (2) of the compensation law (33 U. S. C., sec. 908 (f), (1), and (2)). Appellant failed to raise any such question, however, at the hearing before the deputy commissioner on February 6, 1941, and the deputy commissioner had no opportunity to consider any matter relating to the application of the provisions of the compensation law above referred to. Having failed to raise any such issue before the deputy commissioner, appellant has, of course, waived any right it may have had to have this Court consider any question with respect thereto: *Metropolitan Casualty Company v. Hoage, deputy commissioner*, 67 App. D. C. 54, 89 F. (2d) 798; *Maryland Casualty Company v. Frank A. Cardillo, deputy commissioner, and Mary Najjum*, 71 App. D. C. 160, 107 F. (2d) 959. Counsel for appellant has not presented any argument on this point in the brief filed in this Court and we have regarded the point as having been waived and abandoned.

For the foregoing reasons, it is respectfully contended that the order of the lower court dismissing the complaint should be affirmed with costs to appellees.

EDWARD M. CURRAN,
United States Attorney,
BERNARD J. LONG,

Assistant United States Attorney,
Attorneys for Appellee Frank A. Cardillo.

JAMES E. McCABE,
Transportation Building, Washington, D. C.,
Attorney for Appellee Braswell.

WARD E. BOOTE,
Assistant Chief Counsel,
United States Employees'
Compensation Commission.

HERBERT P. MILLER,
Associate Counsel,
Of Counsel.

APPENDIX

18 UNITED STATES EMPLOYEES' COMPEN- SATION COMMISSION DISTRICT OF CO- LUMBIA COMPENSATION DISTRICT

COMPENSATION ORDER—MODIFICATION OF AWARD, CASE
No. 48-30

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE DISTRICT OF COLUMBIA WORKMEN'S COM-
PENSATION ACT, J. E. BRASWELL, CLAIMANT

vs.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY,
EMPLOYER AND SELF-INSURER

A compensation order was filed in the above-entitled case on August 31, 1931, awarding compensation to the claimant above named for temporary total disability at the rate of \$11.54 per week and directing that compensation payments be continued at the said rate from February 16, 1930, until further order of the Deputy Commissioner. The said compensation order is made a part hereof by reference; on September 25, 1934, the employer applied for a modification of the award on the ground of a change in conditions. Thereafter, on November 22, 1934, a so-called "compensation order, modification of award", was filed, which also is made a part hereof by reference. On August 30, 1935, a notice was filed by the employer indicating that payments of compensation at the rate of \$11.54 per week were being resumed. A further notice was filed by the employer on September 20, 1940, indicating that such payments of compensation had been sus-

pending, and a request was made for formal action terminating the award.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held upon the application of the employer and upon the Deputy Commissioner's own initiative, the Deputy Commissioner makes the following

FINDINGS OF FACT

That in accordance with the terms of the compensation order filed on August 31, 1931, the employer continued payments of compensation for temporary total disability at the rate of \$11.54 per week to the claimant and paid such compensation from February 16, 1930, to and including January 10, 1932, in the amount of \$1,142.46; that on January 11, 1932, the claimant was given selective employment by the employer herein and was paid his full salary of \$18 per week until some time thereafter, when his salary was reduced to \$15 per week due to a general reduction; that the claimant continued to be so employed until August 13, 1935; that during the period from January 11, 1932, to August 13, 1935, the claimant performed only part of the duties which he had performed prior to his injury; that he was not required to do as much lifting as he formerly had done; that he did whatever work he was able to do with difficulty, and suffered continual pain in the back; that following the claimant's re-employment on January 11, 1932, the employer applied for modification and termination of the award of August 31, 1931; that upon the application of the employer a hearing was scheduled on November 22, 1934; that at the said hearing no testimony was taken; that upon discussion of their respective contentions by the interested parties, it was found that

the said parties were in agreement as to the facts and as to the status of the case; that the parties entered 19 into an agreement, the terms of which were recited by the Deputy Commissioner on the record; that the terms of the stipulation were accepted by the opposing counsel and that in confirmation thereof the Deputy Commissioner incorporated the facts and terms of the said stipulation in a so-called "compensation order" filed on November 22, 1934; that in substance the stipulation provided as follows:

That the salary paid to the claimant subsequent to January 11, 1932, did not represent his wage-earning capacity; that from the said date the claimant's disability was partial rather than total in character, and that since the wages paid the claimant were in excess of his actual wage-earning capacity, the amount over and above his actual wage-earning capacity was to be considered as payment of compensation for partial disability; that it was, therefore, unnecessary to establish the actual wage-earning capacity of the claimant until such time as the conditions should change.

That the said parties agreed to the continuance of the case on the said basis pending a change in conditions; that no request for a modification of the case or for a determination of the wage-earning capacity was thereafter filed; that in lieu thereof the employer made a voluntary modification of the case by resuming the payment of compensation at the full rate of \$11.54 per week beginning August 13, 1935, and filed a notice 20 thereof with the Deputy Commissioner; that on August 13, 1935, while alone in the employer's store, the claimant was compelled to wait on a customer who requested a five-gallon can of kerosene; that as the claimant lifted the can he was seized with a severe pain in the back, suffering a recurrence and aggravation of the previous back injury; that before leaving the em-

ployer's store he advised the store manager of the injury sustained, and on the following morning he telephoned his superior to advise that he was unable to resume his work because of pain in the back; that the claimant was thereafter wholly disabled; that on August 30, 1935, the employer filed with the Deputy Commissioner a notice on Form DCCA-306, that payment of compensation had been resumed beginning August 13, 1935, at the rate of \$11.54 per week without awaiting an award; that all payments of compensation made thereafter were for temporary total disability; that on August 31, 1940, such compensation payments were suspended; that the wages paid to the claimant by the employer from January 11, 1932, to August 13, 1935, were not wages that he was able to earn and they do not fairly and reasonably represent his wage-earning capacity; that during the said period the claimant suffered a loss of wage-earning capacity equivalent to 50 percent of his average weekly wages, and he is entitled to compensation for such partial disability at the minimum rate of \$8 per week; that beginning August 13, 1935, and as a result of the injury sustained, the claimant was wholly disabled, and he is entitled to compensation for such temporary total disability at the rate of \$11.54 per week; that temporary total disability is continuing; that the accrued compensation for temporary total disability from August 13, 1935, to February 6, 1941, inclusive, is \$3,305.39 (286 $\frac{3}{7}$ weeks at \$11.54 21 per week); that the employer has paid \$3,041.62 to the claimant as compensation for temporary total disability subsequent to August 13, 1935.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, The Great Atlantic and Pacific Tea Company, a self-insurer, shall pay to the claim-

ant herein compensation as follows: For temporary total disability, $286\frac{3}{7}$ weeks at the rate of \$11.54 per week, from August 13, 1935, to February 6, 1941, inclusive, amounting to \$3,305.39. The employer, having already paid the sum of \$3,041.62 as compensation, shall pay to the claimant forthwith the balance of \$263.77; and shall continue payments thereafter in biweekly installments at the rate of \$11.54 per week, subject to the limitation of the law or until otherwise ordered.

A fee for legal services rendered in connection with this claim is approved in favor of Attorney James E. McCabe in the amount of \$75, same to be a lien upon and deducted from the payment of this award.

Given under my hand at Washington, D. C., this eleventh day of March 1941.

[s] FRANK A. CARDILLO,
Deputy Commissioner,
District of Columbia Compensation District.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer (self-insurer), attorney for the claimant, and attorney for the employer, at the last known address of each as follows:

<i>Name</i>	<i>Address</i>
Mr. J. E. Braswell-----	5514 Sherrier Place, NW., Washington, D. C.
The Great Atlantic & Pacific Tea Company-----	805 Channing Place, NE., Washington, D. C.
Mr. James E. McCabe-----	Transportation Building, Washington, D. C.
Mr. Caruthers Ewing, Jr----	726 Jackson Place, NW., Washington, D. C.

Mailed MARCH 11, 1941.

[s] FRANK A. CARDILLO,
Deputy Commissioner.

119 UNITED STATES EMPLOYEES' COMPEN-
SATION COMMISSION DISTRICT OF
COLUMBIA COMPENSATION DISTRICT

COMPENSATION ORDER—AWARD OF COMPENSATION,
CASE No. 48-30

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE DISTRICT OF COLUMBIA WORKMEN'S COM-
PENSATION ACT, J. E. BRASWELL, CLAIMANT

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
EMPLOYER AND SELF-INSURER

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the fifteenth day of February, 1930, the claimant above named was in the employ of the employer above named at 1801 Connecticut Avenue NW., Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that

the liability of the employer for compensation under said Act was insured by the said employer's qualifying as a self-insurer; that on said date the claimant herein, while in the employ of the employer above named as a clerk, in a store at 1801 Connecticut Avenue NW., in the District of Columbia, sustained personal injury which arose out of and occurred in the course of his employment, and resulted in his disability; that while so employed and while lifting a crate of groceries, he suffered a strain in the lower part of his back on the right side, causing immediate pain; that he continued to work for the rest of the day with difficulty, and has been unable to work subsequent to the date of the injury, February 15, 1930; that the claimant was receiving a wage of \$18.00 per week, working six days, and he is, therefore, entitled to compensation at \$11.54 per week; that the employer has paid compensation from February 15, 1930, to the date of the hearing, namely, August 26, 1931, and he is entitled to take credit therefor; that the employer denies further liability for the payment of compensation subsequent to August 26, 1931, on the ground that the disability which the claimant was suffering on August 26, 1931, was due to other causes than the injury of February 15, 1930; that the claimant has been totally disabled as a result of the injury sustained on February 15, 1930, continuously from the date of the injury to August 26, 1931, and that said total disability as a result of the injury above set forth still continues; that the claimant is, therefore, entitled to compensation at \$11.54 per week, beginning February 16, 1930, to and including August 26, 1931, a period of $79\frac{4}{7}$ weeks, amounting to \$918.25, less compensation already paid by the employer; that the claimant is further entitled to compensation at \$11.54

per week beginning August 27, 1931, while such temporary total disability resulting from the injury of February 15, 1930, shall continue; that Attorney James E. McCabe rendered legal services in behalf of the claimant herein, and for such services his fee is approved in the amount of \$35.00 as reasonable.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following:

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AWARD

That the employer and self-insurer, The Great Atlantic & Pacific Tea Company, shall pay compensation to the claimant herein beginning February 16, 1930, to and including August 26, 1931, a period of $79\frac{4}{7}$ weeks, at \$11.54 per week, amounting to \$918.25; shall continue to pay compensation beginning August 27, 1931, at the rate of \$11.54 per week, payable every two weeks, until further order of the Deputy Commissioner; shall pay to Attorney James E. McCabe for legal services rendered in behalf of the claimant herein the sum of \$35.00, which amount shall constitute a lien upon and be paid out of the unpaid installments of compensation; and shall furnish such necessary medical, surgical, and hospital care and treatment as the nature of the injury and the process of recovery may require.

Given under my hand at Washington, D. C., this thirty-first day of August, 1931.

[SGD] R. J. HOAGE,

Deputy Commissioner,

District of Columbia Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the

claimant, the employer, Attorney James E. McCabe, and Attorney J. A. Marshall, at the last known address of each as follows:

<i>Name</i>	<i>Address</i>
Mr. J. E. Braswell-----	5514 Sherrier Place, NW., Potomac Heights, D. C.
The Great Atlantic & Pacific Tea Co.	805 Channing Place, NE., Washington D. C.
Mr. James E. McCabe, Attorney-----	733-734 Transportation Bldg., Washington, D. C.
Mr. J. A. Marshall, Attorney-----	% Douglas, Obear & Douglas, Southern Bldg., Washington, D. C.

Mailed AUGUST 31, 1931.

[Sgd.] R. J. HOAGE,
Deputy Commissioner.

122 UNITED STATES EMPLOYEES' COMPEN-
SATION COMMISSION DISTRICT OF
COLUMBIA COMPENSATION DISTRICT

COMPENSATION ORDER—MODIFICATION OF AWARD
CASE No. 48-30

IN THE MATTER OF THE CLAIM FOR COMPENSATION
UNDER THE DISTRICT OF COLUMBIA WORKMEN'S COM-
PENSATION ACT, J. E. BRASWELL, CLAIMANT

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
EMPLOYER AND SELF-INSURER

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 31st day of August 1931, a compensation order was issued in the above-entitled case, which order is to be read with and to be made a part of this order by reference in which order the Deputy Commissioner awarded compensation to the claimant as follows:

That the employer and self-insurer, The Great Atlantic and Pacific Tea Company, shall pay compensation to the claimant herein beginning February 16, 1930, to and including Au-

gust 26, 1931, a period of 79 $\frac{1}{4}$ weeks, at \$11.54 per week, amounting to \$918.25; shall continue to pay compensation beginning August 27, 1931, at the rate of \$11.54 per week, payable every two weeks, until further order of the Deputy Commissioner; shall pay to Attorney James E. McCabe for legal services rendered in behalf of the claimant herein the sum of \$35.00, which amount shall constitute a lien upon and be paid out of the unpaid installments of compensation; and shall furnish such necessary medical, surgical, and hospital care and treatment as the nature of the injury and the process of recovery may require.

That all parties of interest were duly notified and no review of said order was had as provided in Section 21 of the Act; that said order became final on the 30th day of September, 1931; that the employer herein, who is a self-insurer, complied with the award referred to above and paid to the claimant compensation under the terms of the said award to and including the 11th day of January, 1932, at which time Mr. Braswell was reemployed by the employer at the same salary he was receiving before the accident, but was given lighter work, or work without lifting, because of his physical condition.

The insurance carrier herein made application for a hearing requesting modification of the award as provided in Section 22 of the Act on the ground that the condition of the claimant had changed; that the employer herein contended that the claimant's disability at this time is not one of temporary total disability, admitting that his condition is one of temporary partial disability and requesting a modification of the award on this ground.

It is found that the claimant's condition subsequent to January 11, 1932, has been one of temporary partial disability and that the employer herein has paid

him the wage he was originally receiving at the time of the injury, but that this does not entirely represent the wage-earning capacity of the claimant at this time and by reason of his physical condition he is being given selective work in order that he may carry on; that the Deputy Commissioner determines that the wage-earning capacity of the claimant is less than that which he is receiving at this time, and has received since the 11th of January, 1932, but inasmuch as the employer herein is paying him his full wage, and the claimant is suffering no wage loss, the employer, by paying the full wage of the claimant, is estopping him from making claim for compensation and that the amount over and above a wage-earning capacity which the claimant might have, which the employer is paying monthly, may be considered as compensation.

124 It is found that the claimant is receiving the full amount or more than he is entitled to receive under the provisions of the Compensation Act from the employer, but that his condition is one coming under Section 8 (e) of the Act, and therefore is subject to review at such time as it may be found that the conditions have changed, and that his wage-earning capacity may be established by evidence.

The order, therefore, is modified to read that the claimant has suffered temporary partial disability subsequent to January 11, 1932, and that said temporary partial disability still exists; that the need for establishing the wage-earning capacity does not arise at this time by reason of the fact that the employer is paying the claimant his full wage and giving him selective work.

Given under my hand at Washington, D. C., this twenty-second day of November, 1934.

_____,
Deputy Commissioner,
District of Columbia Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, attorney for the claimant and the attorney for the respondent at the last known address of each as follows:

<i>Name</i>	<i>Address</i>
Mr. J. E. Braswell-----	5514 Sherrier Place NW., Washington, D. C.
The Great Atlantic & Pacific Tea Co.--	805 Channing Place NE., Washington, D. C.
Mr. James E. McCabe-----	Transportation Bldg., Washington, D. C.
Mr. J. A. Marshall-----	c/o Douglas, Obear, Morgan & Campbell, Suite 822, Southern Building, Washington, D. C.

Mailed November 22, 1934.

_____,
Deputy Commissioner.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS DESIGNATED
BY APPELLEES, HEARING OF NOVEMBER 13, 1934

110 The DEPUTY COMMISSIONER. As I understand it, this hearing has arisen by reason of the application, as stated by you, Mr. Marshall, and inasmuch as the order stands without modification at this time, the burden of proof will be upon you to determine what the condition is.

111 Mr. MARSHALL. I understand.

The DEPUTY COMMISSIONER. Is that the only issue?

Mr. MARSHALL. So far as I know, that is the only issue.

Mr. McCABE. My contention is this: This is rather an unusual case. It is the first one I have seen of this type before the Deputy Commissioner.

This man was put back to work with a weak back. It was known that his back was weak, and he was put back to work with the understanding that he would be given selective work; that is, work requiring no heavy lifting or anything which would injure further his already injured back. He has been working since he went back with the Great Atlantic & Pacific Tea Company in January, 1932, with the understanding that he is to be given selective work. In other words, he is not doing a full day's work, but he is being given selective work—work requiring no particularly heavy lifting. He is a favored man at his place. He is not the man he was; and the record of the first hearing will show that Dr. Talbot, their own doctor, testified that he will never be

able to do a full day's work. He is now carrying on selective work under difficulties which we intend to prove.

The DEPUTY COMMISSIONER. Then, it is your contention that he does have some physical disability from which he is suffering yet?

Mr. McCABE. Absolutely. I think that the Great Atlantic & Pacific Tea Company has done a wise thing 112 by putting this man back to work and letting him do selective work. I think it is the most ideal arrangement that can be made for a man with a partially injured back. It keeps his mind occupied. I think that the man is being paid probably all he is worth on selective work, but he is doing selective work and is not out in the open market.

He is not any better today, we expect to prove, than on the day he went back to work in January, 1932 when he was given selective work. We say that the award should stay open, because this man at any time is apt to get a flare-up which will set him back to a point where he will be totally disabled. As long as the record of the first hearing has been made a part of this hearing I expect to introduce medical testimony which will show you that Dr. Talbot testified that this man would never be able to do a full day's work as long as he had any residuals of the injury. I think that this award should stay the way it is. If this award terminates and he gets a flare-up, he cannot come in.

Mr. MARSHALL. May I make an observation for the record? It is that the award was that the claimant was temporarily totally disabled.

The DEPUTY COMMISSIONER. Are you merely asking for a modification of that award now to place the claim under section 8 (e) of the Act?

113 Mr. MARSHALL. Yes.

The DEPUTY COMMISSIONER. That is all you are asking for?

Mr. MARSHALL. Yes.

The DEPUTY COMMISSIONER. Then there is no difference between you?

Mr. MARSHALL. No.

The DEPUTY COMMISSIONER. Mr. McCabe, are you willing to have the award brought under section 8 (e) of the Act, keeping the award open?

Mr. McCABE. Yes, provided the award is kept open. One of the difficulties with that, Mr. Hoage, the way it is working out now, is that if they are going to pay the man the full amount of wages they paid him before he was injured, or if they are trying to find out his degree of disability at the present time——

The DEPUTY COMMISSIONER (interposing). If they contend that there is a degree of disability, and we issue a decree modifying the original award, bringing it under section 8 (e) of the Act, I cannot see where it will do the claimant any harm, because at any time, the provision itself provides, the order can be modified upon a change in conditions.

Mr. MARSHALL. That is true, we admit that he suffers at this time some partial disability, but we do contend, if Your Honor please, that he has suffered no loss of earning power and he is not entitled to any award at this time.

114 The DEPUTY COMMISSIONER. Then, it is stipulated by both parties of interest that the contention of the claimant at this time is not one of temporary total disability, as provided in section 8 (b) of the Act and that while he has disability to the back he is not totally disabled, and, therefore, his case should fall within the meaning of section 8 (e) of the Act. It is agreed by both parties of interest that the finding upon that basis will be agreeable to them.

Mr. McCABE. That would still leave the award open?

The DEPUTY COMMISSIONER. It always leaves it open. It cannot do any harm, but it does what Mr. Marshall wants. It leaves the award open so that the case is not a total disability.

Mr. MARSHALL. That is right.

The DEPUTY COMMISSIONER. Have you anything further to say with regard to the stipulation? Do you see any reason for putting in evidence if the stipulation is made that way?

Mr. MARSHALL. No.

The DEPUTY COMMISSIONER. Very well. I will dictate the order now and make it a part of the record. If you have any objections, make a memorandum of them and we will correct it as we go along.

On the 31st day of August, 1931, a compensation order was issued in the above entitled case, which order is to be read with and made a part of this Order by reference. * * *

The wording of the stipulation before Deputy Commissioner Hoage at the hearing on November 13, 1934, is set forth on page 17 of the Appendix of Appellant's brief. This quotation is not complete and we are therefore quoting the last paragraph of the statement made by the Deputy Commissioner as follows:

116 A wage earning capacity for the claimant has not been established at this time by reason of the fact that the employer herein is paying him the full wage rate that he was receiving at the time of the injury, by the elimination of heavy work, by reason of the residual effect of the injury sustained by him on the above-named date.

Is there anything else Gentlemen?

Mr. McCABE. No, I think that that covers it Mr. Hoage.

Mr. MARSHALL. That is satisfactory.

The DEPUTY COMMISSIONER. All right, if that is all the hearing will be concluded and the Order drawn.

STATEMENT BY MR. EWING PRELIMINARY TO HEARING OF
FEBRUARY 6, 1941

* * * * *

127 Mr. EWING. Our position is this: That this man
was employed by the Great Atlantic and Pacific Tea
128 Company when he was approximately 63 years
of age; that he worked for the defendant Company
a year when he received this accident, out of which
this whole matter grows. That his then condition was
an arthritis of the spine; it was advancing and through
the course of time this condition—I won't call it a
natural condition—this condition which he had, irre-
spective of the injury, was gradually disabling him;
that an order of modification entered, I believe, No-
vember 22, 1934, held that the extent of his disability
due to the injury was temporary partial disability and
that the maximum award or length of time for an
award under temporary partial disability is five years,
and we paid him for five years, and whereas at this
time it appears that he is totally and permanently
disabled.

That would seem to be the case from the medical
reports filed, yet that is not due to the accident which
he suffered, but rather to a combination of old age
and the proliferative changes that have occurred in
the condition which existed in the man's spine, that is
an arthritic condition, prior to the accident which he
received.

I think that is just about our whole position.

* * * * *

134 Mr. EWING. I noticed you used the word "so-called order" of amendment. I think that clarifies the issues.

The DEPUTY COMMISSIONER. I think you understand why I did that, because it is not in effect an order directing you or anybody to do anything. There is no wage-earning capacity established, or any change in the previous order so far.

Mr. EWING. My position on this is that at the previous hearing the disability arising from this injury was determined to be temporary partial and that when we paid him disability benefits over a consecutive period of five years on temporary disability—

The DEPUTY COMMISSIONER. At \$11.54 per week.

Mr. EWING. That that is the extent of our liability.

The DEPUTY COMMISSIONER. I understand what the contention is. All right, you may proceed with the first witness.

TESTIMONY OF DR. DUNLAP P. PENHALLOW, CLAIMANT'S
WITNESS AT THE HEARING ON AUGUST 26TH, 1931

63 Q. Do you believe the strain lit it up?

A. I think the strain probably stirred it up, yes.

Q. Doctor, in these arthritic changes and in these osteoarthritic changes, is it not a fact, from a medical viewpoint, that even these osteoarthritic conditions are present and are immediately brought to light when a severe strain or trauma occurs?

A. That is true.

Q. Now, this strain you talk about, Doctor; what in your opinion was it? Was it a sacroiliac strain?

A. Well, I can say it was a strain of the whole back, as far as I can tell from the symptoms; it may
64 have been sacroiliac; in all probability it was more a strain of the muscles of his back.

Q. Now, strains of the back, the small of the back—first, let me ask you this: The small of the back is almost like a hinge of a door on the body. It is a sort of a hinge where they bend sideways and other ways, and when you have an injury in the small of the back it is one of the most difficult kinds of injuries to heal, is it not?

A. They are difficult, yes.

Q. Can you give a prognosis of this man's case as to when he will be able to resume the work he was able to do prior to the time he received the injury?

A. That he was able to do prior to the time he received the injury?

Q. Yes.

A. I would be rather guarded about making an absolute prognosis of that, as to how much he could do as compared with what he could do before.

Q. Do you believe that he will be ever able to do heavy lifting and do that kind of work?

A. I think there is always the danger of a re-aggravation.

Q. You examined the man again, Doctor?

A. I did, yes.

Q. What was the result of the examination, and will you give the date of that examination, please?

65 A. June 19th, 1931, I examined him.

Q. Had his condition improved to any extent, Doctor, when you examined him the second time on June 19, 1931?

A. Yes, there was quite a marked improvement.

* * * *

67 Q. Doctor, do you believe that this man now is able to go back and do the work he was able to do prior to the time he received the injury?

A. Of course, I have no way of judging what his condition was before.

Q. I mean with the history given to you.

A. But, of course, I think it would be rather doubtful if he could go back and do any heavy work.

Q. And, by "heavy work"—you heard the discussion or the description of the kind of work he did?

A. Yes.

Q. Work in a grocery store, wrapping bundles, and so forth, being on his feet for long hours—he was on his feet?

A. Yes.

Q. From your knowledge and your examination, do you believe he is able to go back and do that kind of work now?

A. I should say I do not think so.

Q. Do you think that he will be able to do any light work, now, Doctor?

A. I should think he could do light work.

Q. And by "light work," would you mind explaining that, so that the record may be clear?

A. I mean if he could tend, wait on people and not have to lift heavy objects, such as crates of vegetables or barrels of flour, or things of that sort—the ordinary clerical work.

By the DEPUTY COMMISSIONER:

Q. You mean being on his feet all the time, Doctor?

A. Yes, I should think he might be able to be on his feet quite a little time.

Q. And did not you hear his testimony, Doctor, that when he walks two or three blocks he was tired out?

A. Yes, but he would not be walking so much in the store; he would have, periods, probably, when he could rest to a certain extent.

The DEPUTY COMMISSIONER. All right; go ahead.

By Mr. McCABE:

Q. So that "by light work"—I want it clear, Doctor—your description of "light work," by "light work" you mean if the man was able to wait on customers and sit down at certain periods he may be able to carry on under those conditions?

A. Yes; that is it.

Q. Well, if he were not able to have a job where he could sit down and rest, would you think then that he would be able to carry on?

A. No, I do not think he would.

* * * * *

CROSS EXAMINATION OF DR. TALBOT, WITNESS FOR EMPLOYER, AT HEARING OF AUGUST 26, 1931

By the DEPUTY COMMISSIONER:

101 Q. Doctor, are you familiar now with the duties of a clerk in a store of this kind?

A. Yes; I was a clerk in a store of that kind when I was a boy.

Q. Now, you can answer Mr. McCabe's question.

A. What is it?

By Mr. McCABE:

Q. You heard this man's discussion of his duties, what they were?

A. Yes.

Q. Lifting, and so forth?

A. Yes.

Q. Do you think it advisable that this man do—

A. (Interposing.) If I was the owner of the store I would answer it this way—If I was the owner of the store and this man, knowing his condition as I know it, applied to me for a position, I would not give it to him.

102 By the DEPUTY COMMISSIONER:

Q. State why?

A. For the simple reason that I would feel he probably may have a return of this thing if he did any heavy lifting at all, and I would have to pay him compensation possibly for the rest of his life.

On the other hand, if this man can go into one of these stores as a sort of a relief clerk, possibly, where he waits on customers and does not handle anything heavy, anything heavier than an ordinary package that goes over the counter, there is no reason in the world why he should not. But, if this man is going in there, carrying heavy packages back and forward, putting them up on the shelves, and leaning over, he should not do it. The very nature of the thing shows that he should not have done it then. There is no question in my mind but what this same fundamental disease, arthritis, is still present, and it always will be present and is always a potential cause for back strain.

By Mr. McCABE:

So, if he attempted to do any of this work that he has formerly done this strain is apt to become aggravated again and light up?

A. There is no question about that.

Q. We are just trying to work this thing out, Doctor. I am asking these questions——

103 A. (Interposing.) You understand, too, that I am not testifying for the Atlantic & Pacific Tea Company; I am testifying as I see this thing in order that it may be cleared up. It is the sort of a question that is arising constantly and will keep on arising in just such type cases as this.

Q. We appreciate that. If there was no work such as you suggest that this man could find, he is

totally disabled from his regular occupation as a clerk in the Atlantic & Pacific Tea Company's stores?

A. If this man has to do any lifting, if his duties require any lifting of a crate of groceries with a 25-pound sack of sugar on top of it, he cannot do it or should not do it. There is no question about that.

Q. Or, if he has to do any work which requires him to bend over where he exerts any particular thing, he is apt to have the aggravation again?

A. He is very apt to.

STATEMENT OF EMPLOYER'S COUNSEL AT HEARING OF
AUGUST 26, 1931

29 Mr. MARSHALL. We submit evidence to the effect that Mr. Braswell is not suffering from any injury or from any condition due to an injury received while in this employment.

TESTIMONY OF JAMES E. BRASWELL AT HEARING OF
FEBRUARY 6, 1941

135 By Mr. McCABE:

Q. Mr. Braswell, will you give your full name to the reporter?

A. James Edward Braswell.

Q. How old are you, Mr. Braswell?

A. Seventy-four in September.

Q. This coming September?

A. Last September.

136 Q. Last September, 74 in 1940?

A. Yes.

Q. Mr. Braswell, do you remember being injured in 1930, the first injury you had?

A. Yes, sir.

Q. You remember the testimony showed that they paid you compensation until January 10, 1932, from that injury?

A. Yes, sir.

Q. Then you went back to work?

A. Yes; I went back to work at their request.

Mr. EWING. Mr. McCabe, if it will help any I will agree the statement made by you to Mr. Cardillo is correct as to the fact that we worked out at our initiation an arrangement to go back to work and give him selective work. I don't question your statement to Mr. Cardillo.

The DEPUTY COMMISSIONER. What I would like to get is the actual work he performed as compared with the duties at the time of his injury.

Mr. EWING. He will have to tell us that because I don't know.

Mr. McCABE. Maybe we can cover it this way:

By Mr. McCABE:

Q. Covering the period between January, 1932, when you started back to work, under this agreement to do light work with the company——

137 A. Yes.

Q. And running through to August, 1935, that is roughly about three and a half years, will you tell the Commissioner what work you did and how you did it?

A. Well, according to their letter and the request I was to do light work in the store, such work as I could do without injuring my physical disability.

DEPUTY COMMISSIONER. You say work in the store.

The WITNESS. Yes, work in some one of their stores, but in that correspondence there I wrote them a letter, and answered it and when ordered to by the Commission I stated I was willing to return to work and see whether I could do the light work or not, and if I could I would continue working, but I didn't think I could because of the fact that I had tried myself out on certain light duties around the house and I didn't believe I could continue, but I was willing to try it.

However, I was so disabled, on account of the injury I never could ask anyone else for a job and do a full day's work because of the injury, and if I did return and get work I wanted to be sure I could continue and not be taken advantage of by cutting down personnel, even on the light duty, and also if I had to stop on account of the injury it was to revert back to the Commission and get my compensation.

138 By Mr. McCABE:

Q. Tell the Commissioner what duties you did, just hit the high spots.

A. I waited on the customers behind the counter, mostly, and helped to put up the vegetables and if there was anything that I would injure myself with I would call on some of the clerks to do it and put it where I wanted it. However, many times they were all busy with customers and I had to put things up anyway.

The DEPUTY COMMISSIONER. Tell us some of the duties you did before the injury in 1930 and you did not do after your return in 1932.

The WITNESS. The work consisted of handling anything from a 2-pound box of cocoa to a 250-pound bag of potatoes.

By Mr. McCABE:

Q. Before you were injured, could you do all of the work around the store?

A. Yes, I did what they all did and they could not keep up with me.

Q. After you got injured and you started back in 1932, what change took place? What things did you do compared to what you used to do?

A. I waited on the trade, handling canned goods back of the counter.

Q. Would any of your work require you to bend over?

139 A. Yes, a lot of stuff was under the counter and you have to bend over.

Q. After you went back to work did you do any lifting?

A. Only as I say, sometimes everybody was busy. For instance if someone wanted a 24-pound bag of flour I had to go into the back room and get it. Sometimes they wanted two pounds of navy beans and there were none there and I would have to get a 100-pound bag and open it.

Q. What was the difference between the work you did in 1932, after your injury, and what you did prior to the time you got your original injury? What was the difference?

A. The only difference was I didn't do as much lifting as I did before I was injured.

Q. Now, getting into 1935, August, 1935, tell the Commissioner what took place.

A. Well, I was doing the same kind of work right on through, having to lift things once in a while, and on the 13th day of August there was but one young fellow in the store besides the manager when I got there and he didn't seem to know much and I put on some vegetables before the customers came in and about 12:30 the manager went to get some lunch and this fellow went off somewhere and a young boy came in for five gallons of kerosene and I went back and hung the can up on the hook and then proceeded to draw oil until I got the five gallons, and I went back
140 out to see if I could find this boy and could not, and this young chap was a mere boy. He said, "Damn it, hurry up, the truck is waiting out there," and I put a crate of oranges there and lifted the five-gallon can off the hook.

Q. What happened?

A. When I began to lower it down it hit my back tremendously. I set it down and called the boy in the back room to get it, which he did, a young boy about four and a half feet tall. I suffered immensely the balance of the day but I did stay there until the day was up.

When I got ready to go at 6 o'clock I said to their superintendent, Mr. Hunt, "I don't know whether to come back or not," that I had hurt my back awfully bad that day. He know about all the case. He said, "All right, Mr. Braswell, be careful." The next morning I could not do anything. I could not get out of bed and I called this man, Mr. Hunt, and told him my back was hurting so bad I could not return to work. He said, "All right, Mr. Braswell, that is all right. Be careful and take care of yourself."

Q. You stayed away from work until around October 1st—

The DEPUTY COMMISSIONER. Pardon me. Did I understand the next day you didn't go in?

The WITNESS. Yes. I didn't go in the next day. There is a little bit of clarifying I might do for your benefit. I was having to lose one day, but I first started on Friday—

141 The DEPUTY COMMISSIONER. Never mind that.

By Mr. McCABE:

Q. You stayed off work until about October 1st, and about October 1st did you go back to work?

A. Yes, sir.

Q. You went back to work and worked how many days?

A. One day, on Monday.

Q. On Monday?

A. I tried to.

Q. Then that evening what happened?

A. When I got home that evening my wife told me Mr. Morgenthau had been out there.

Q. For the purpose of the record, who is Mr. Morgenthau?

A. One of our superintendents, I was fixing to say.

Q. Mr. Braswell, Mr. Morgenthau was out there and what did he want?

A. He said not to go back to work until I heard from them, that they wanted to give me a physical examination by a Doctor.

Q. Did there come a time when you were examined by a doctor for the Company?

A. Yes, the next Monday after that.

Q. You were examined by whom?

A. His name is Edmonston, and he is an assistant
142 to Dr. Brady.

Q. Assistant to Dr. Brady?

A. Yes, sir.

Q. Is that Dr. Brady on East Capitol Street?

A. Yes, sir.

Q. When he got through examining you, did he say anything?

A. Yes, he walked out in the living room and said, "Are you willing to return to work if you are able to?" and I said, "Yes, I am willing to try."

Q. Did you ever hear anything more from the doctor or the Company?

A. Never heard anything until I got that paper about ten days after I was examined.

Q. Now, I will show you this form DCCA-306, entitled "Notice to the Deputy Commissioner that the payment of compensation has begun without awaiting award," and I will ask you if that is the form you received.

A. Yes, this is the one I received, signed by their employment office manager, R. F. Hamson.

The DEPUTY COMMISSIONER. Would you give the date of that?

By Mr. McCABE:

Q. What is the date of that notice?

A. August 29th.

143 The DEPUTY COMMISSIONER. 1935?

The WITNESS. Yes.

By Mr. McCABE:

Q. When did you receive this?

A. I received that about the 15th of October, about ten days after the examination.

Q. 15th of October, what year?

A. 1935.

Mr. McCABE. I will offer this in evidence, Mr. Commissioner, and I ask that it be marked "Claimant's Exhibit No. 1."

190 CLAIMANT'S EXHIBIT #1

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT
OFFICE OF DEPUTY COMMISSIONER, WASHINGTON, D. C.

Case No. —

Insurance Carrier's No. —

Notice to the Deputy Commissioner That Payment of Compensation Has Begun Without Awaiting Award

1. Name of Employer: The Great Atlantic & Pacific Tea Company, Inc.

2. Office address: 805 Channing Place, NE., Washington, D. C.

3. Name of Injured Person: J. E. Braswell.

4. Present address: 5514 Sherrier Place, NW., Washington, D. C.

5. Date of accident or first illness: February 15th, 1930. Date disability began: August 13, 1935.

6. Compensation is to be paid to: J. E. Braswell.

7. Average daily wage: \$3.00 multiplied by 300 = \$900.00 divided by 52 = average weekly wage \$17.31, multiplied by $\frac{2}{3}$ = compensation rate, \$11.54.

8. Compensation shall be payable from the 13th day of August, 1935, until notice is given the Deputy Commissioner that payment has been stopped or suspended.

9. Date of first payment: August 24th, 1935.

191 Name of Insurance Carrier: Self insurer.

Signed by: R. F. Hampson.

Official Title: Office Manager.

Dated: August 29, 1935.

Copy of the form as completed to be given to person to whom compensation is paid at time of first payment.

* * * * *

144 By Mr. McCABE:

Q. You received those payments under that notice until when?

A. Until August 31st, 1940.

* * * * *

Q. Now that period between 1932 when you went back to work in 1932 through until August, 1935, when you received this other injury that you described, were you working under difficulty?

A. Oh, yes, very considerably so. I had to be as careful as I could, and then suffered tremendous pain and very intensely at times, but I would hold on every day until quitting time, with the exception of four or five days during this interval I would have to stay home because my back was hurting so bad I could not work and called the manager and told him I didn't think I could stay if I came and I was hurting too bad to come and he would tell me all right.

* * * * *

145 Q. Have you ever had to sit down at work?

A. Yes, I would go in the back room and fix four or five sacks together and put a 5-pound sack of flour at my back and rest until they hollered "front," and I would have to help wait on the trade.

146 Q. Did you have continuous pain in your back?

A. Yes, sir.

Q. How does that affect your legs?

A. The right leg is considerably affected in the foot. It hurts down the foot, but never down to the knee. The foot is numb right now, although it isn't swollen. It hurts in the back and right here (indicating) all the while.

* * * * *

158 By the DEPUTY COMMISSIONER:

Q. Mr. Braswell, let me ask you one or two questions. Your wages at the time of the injury in 1930 were \$18 a week?

A. That is what they were paying me.

Q. When you went back to work in January, 1932, what did they pay you?

A. They paid the regular wage, \$18 a week.

Q. The regular wage, \$18 a week?

A. What they agreed if I would return.

Q. Did they continue to pay you \$18 a week?

A. All but about a year, they forced me to lose one day a week and I only got \$15.00.

Q. Why was that?

A. They claimed they had to let several of the boys off a day.

Q. That was general?

A. Yes. We had a small number of clerks in some places where they needed them all day.

* * * * *

DIRECT EXAMINATION OF DR. FRANK E. GANTZ, CLAIMANT'S
WITNESS

161 Q. Dr. Gantz, how long have you been engaged in practice in the District?

A. Since 1926.

Q. Have you been specializing in any kind of work?

A. General surgery, last 10 years chiefly traumatic injuries arising out of accidents.

Q. You run the Farragut Clinic?

A. Yes.

Q. Doctor, in connection with your work, you come in contact with persons with low back strain?

A. Yes

Q. Do you find them often or are they rare?

A. They are frequent.

Q. Do you have to treat cases of low back strain imposed on pre-existing arthritis?

A. Yes, sir.

Q. Did you have occasion to examine the claimant in this case?

A. I did.

Q. Calling your attention to the last time you examined the claimant, what was the date?

A. I examined him October 28, 1940.

Q. Did you get a history from him?

A. The history in brief: He states that on February 17, 1930, while carrying a box of groceries for a customer, he had severe pain in the right hip. This caused a cessation of work for 23 months, after which he went back to work on a light-duty status and worked continuously with the exception of a few days until August 13, 1935, after which he was unable to work at all following the lifting of a can of kerosene and has not worked since.

* * * * *

Chief complaint: Pain in low back and right hip. There is no other discomfort at any other point excepting numbness in the right leg. Any motion of any kind causes pain in low back. Examination reveals a man who stands and walks in a typically guarded manner as if protecting a painful back. He stands with a slight anterior tilting of the spine. There is practically complete absense of the normal lumbo-sacral curve and there is marked spasticity of the para-vertebral muscles in the lower dorsal and lumbar areas. Forward bending is carried out to a point about 70 degrees from the vertical at which point he is inclined to fall slightly forward and regains the erect posture with marked difficulty. Passive forward straight leg raising is approximately normal on the left and is somewhat limited on the right. It is 163 noted that in the bending maneuvers, all motion is at the hips rather than in the spine.

* * * * *

Diagnosis and opinion: This represents a case where a man with a preexisting spinal arthritis with proliferative changes suffered an injury to his low back at approximately the age of 64. During most of this time, from 64 to 74 years, he has been incapacitated for any type of work. We find him at the age of 74 not having worked for five years and probably in worse physical condition after five years than he was at the time of his most recent back strain. At the time of his original injury, he unquestionably had a ground work laid for his permanent disability in that he had unquestionably a spinal arthritis. At the present time, he is totally disabled for carrying out any type of gainful occupation and has been since the date of his second injury. I believe that this is a total permanent disability.

DIRECT EXAMINATION OF DR. FRANK E. GANTZ, CLAIMANT'S
WITNESS

161 Q. Dr. Gantz, how long have you been engaged in practice in the District?

A. Since 1926.

Q. Have you been specializing in any kind of work?

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Q. You run the Farragut Clinic?

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A. Yes

Q. Do you find them often or are they rare?

A. They are frequent.

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Q. Did you have occasion to examine the claimant in this case?

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Chief complaint: Pain in low back and right hip. There is no other discomfort at any other point excepting numbness in the right leg. Any motion of any kind causes pain in low back. Examination reveals a man who stands and walks in a typically guarded manner as if protecting a painful back. He stands with a slight anterior tilting of the spine. There is practically complete absense of the normal lumbo-sacral curve and there is marked spasticity of the para-vertebral muscles in the lower dorsal and lumbar areas. Forward bending is carried out to a point about 70 degrees from the vertical at which point he is inclined to fall slightly forward and regains the erect posture with marked difficulty. Passive forward straight leg raising is approximately normal on the left and is somewhat limited on the right. It is 163 noted that in the bending maneuvers, all motion is at the hips rather than in the spine.

* * * * *

Diagnosis and opinion: This represents a case where a man with a preexisting spinal arthritis with proliferative changes suffered an injury to his low back at approximately the age of 64. During most of this time, from 64 to 74 years, he has been incapacitated for any type of work. We find him at the age of 74 not having worked for five years and probably in worse physical condition after five years than he was at the time of his most recent back strain. At the time of his original injury, he unquestionably had a ground work laid for his permanent disability in that he had unquestionably a spinal arthritis. At the present time, he is totally disabled for carrying out any type of gainful occupation and has been since the date of his second injury. I believe that this is a total permanent disability.

Q. From the history which you got in this case and from the testimony that you heard today, do you believe that even going back to 1935 that after that 164 injury which you described and he was laid up and hasn't worked since outside of one day, that this man could carry on as a grocery clerk doing the work required around a grocery store?

A. No, I do not believe he could.

(Redirect examination of Dr. Gantz by Mr. McCABE:)

169 Q. Doctor, do you have cases similar to this
170 where you have a back strain imposed upon a pre-existing arthritis?

A. Oh, yes.

Q. When that back strain is imposed on an existing arthritis does pain oftentimes persist from the time of the original back strain?

A. Yes, sir.

Q. And continues on through the years?

A. Yes, sir.

Q. Is this a typical case of it?

A. I would say so, yes, sir.

Q. Can that pain grow worse as time goes on?

A. It can; yes, sir.

Q. Can lifting or bending aggravate that condition?

A. I don't think there is any question about that.

* * * * *

CROSS-EXAMINATION OF DR. TALBOT. EMPLOYER'S WITNESS

* * * * *

179 Q. Is it your theory you can reach a point in your mind where the strain angle is over with, and the pain the man has had continuously from the time he had the strain is from that time due to arthritis.

A. No, I said it is very difficult to evaluate that, but let me say this, that viewing this man's films

taken in 1931, I am positive in my own mind that any individual showing that much bone change, he may 180 not have had pain, but his back was not flexible. Even before he hurt it he had a stiff back. He had clinical symptoms. His attention may not have been drawn to them. He had symptoms. It is very, very true many of these individuals go along without symptoms.

* * * * *

182 The DEPUTY COMMISSIONER. I think, Doctor, the question Mr. McCabe wanted to have answered and I am interpreting it is did the injury cause the arthritis to become painful.

The WITNESS. Well, I imagine it would, with a back of this type it is apt to produce pain, yes, and it is apt to prolong beyond normal.

By Mr. McCABE:

Q. Could it continue through the years?

A. I don't know.

Q. I am just asking.

A. It could possibly. As I stated in the direct testimony I want to try to be fair with this man and I think 25 percent for numerous small strains is certainly a fair estimate that can be attributed to them and the rest is due to the general physical condition.

* * * * *

183 Q. You testified in August, 1931 at the hearing here?

A. I did.

Q. And then you did not see the man until October, 1940?

A. I saw him in October, 1940, that is right.

Q. Your opinion in 1940 is the same as you gave at the time you testified in August, 1931, this man had 25% permanent partial. Is that right?

A. Yes, sir.

* * * * *

186 STATEMENT OF DEPUTY COMMISSIONER AT CLOSE OF
HEARING ON FEBRUARY 6TH, 1941

The DEPUTY COMMISSIONER. I will state in conclusion that it is a complete surprise to this office that payment of compensation has been made since August of 1935 was recently considered to be payment of partial disability rather than temporary total. The reason is when that notice was received it indicated payment had been made at the full rate of \$11.54, which was the rate of compensation upon which the first award was based, of temporary total disability, and further, there appears in the file a memorandum from the same Claims Examiner who handled the case, he discussed with the then Deputy Commissioner, Mr. Hoage, the necessity of establishing the wage earning capacity, and according to the notation of the Examiner, Mr. Hoage then Deputy Commissioner notified the Examiner that it was not necessary to take that action in the case because it appeared compensation was being paid for temporary total disability. That memorandum is dated February 11th, 1937. So that I merely state it was assumed 187 or presumed that payments were being made for temporary total disability. That is what this hearing is for.

* * * * *

The DEPUTY COMMISSIONER. Why didn't you at that time, or whoever handled the case, make an application for the fixing of the wage earning capacity?

Mr. EWING. Because, in their opinion, there was a temporary partial disability which had been established as being all that was contributory to this injury.

The DEPUTY COMMISSIONER. If that was so you would not have had to pay on the basis of \$11.54 per week.

Mr. EWING. That is correct, and I will say it hasn't been the policy of the Great Atlantic and Pacific Company to chisel on a dollar or two here and there, and it was decided to pay him what he would have been entitled to for total disability, \$11.54, and there is some correspondence with the Claims Examiner in arriving at that figure.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

IN THE

FOR THE DISTRICT OF COLUMBIA

— FEB 17 1942
No. 8011
—

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
A CORPORATION, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER,
UNITED STATES EMPLOYEES' COMPENSA-
TION COMMISSION, AND JAMES E. BRASWELL,
Appellees.

—
Appeal from the District Court of the United States
for the District of Columbia
—

CARUTHERS EWING, JR.,

of

FELDMAN, KITTELLE, CAMPBELL
& EWING,

726 Jackson Place, N. W.,
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Appeal from the District Court of the United States
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REPLY BRIEF FOR APPELLANT

**There is no Admission of Total Disability by a Resumption
in August 1935 of Weekly Compensation Payments of
\$11.54**

Considerable argument is directed by Appellees to the fact that in August 1935 the A. & P. resumed the payment to Mr. Braswell of compensation at the weekly rate of \$11.54. This figure is that at which it would have been liable on a basis of total disability. Appellees contend that this is an admission on the part of the A. & P. that Mr. Bras-

well's condition was one of total disability and not one of temporary partial disability by reason of said injury under Section 8 (e) of the Act, [Act of Mar. 4, 1927, c. 509, Sec. 8, 44 Stat. 1427, 33 U. S. C. Sec. 908 (e)] as found by Deputy Commissioner Hoage on November 22, 1934 (Appellant's Appendix 17).

On page 10 of Appellees' brief, the statement is made that Mr. Braswell testified:

" . . . that thereafter compensation was paid to him at the full rate of \$11.54 per week for total disability (Appellees' App. 59, 60);"

Mr. Braswell never did so testify. The question, objection, and ruling are as follows:

"Q. Now, you received this payment for total disability from August—

"Mr. Ewing: That is objected to as a conclusion. He received \$11.54.

"The Deputy Commissioner: I will consider the objection on the statement of total disability.

"Mr. McCabe: All right, I will leave that to be drawn from the statement itself." (Tr. 143-4)

The record shows the A. & P. made the payments under Section 8 (e). A year after the resumption of payment of \$11.54, and on August 6, 1936, the then attorneys for the A. & P. wrote the Appellant:

"It is my understanding Mr. Braswell finally stopped work on August 12, 1935 and you have been paying him \$11.54 since that time. If you have done nothing further your maximum liability would be payment of such compensation for a total of five years. Mr. Braswell would always have the right to appeal to the Compensation Commission for the purpose of showing he was now totally disabled as a result of his injury in which event if he proves such fact your maximum liability would amount to \$7,500." (Appellant's App. 25).

While it appears, as stated by Mr. Cardillo, that the office of the Deputy Commissioner " . . . assumed or presumed

that payments were being made for temporary total disability," (Appellees' App. 66) yet the actual fact is otherwise. The A. & P. clearly felt, and was so advised by its attorneys, that it was paying on a basis of the Modification of Award *fixing the disability due to the accident as temporary partial*. By virtue of Section 8 (e) the employer is not liable for such compensation for a period exceeding five years. It paid Mr. Braswell such compensation from August 13, 1935 through August, 1940,—a full five year period.

Thus, there is positive proof in the record that there was no admission of total disability due to any injury merely by a resumption in August 1935 of weekly payments of \$11.54. Appellees' whole argument to the contrary is based on admitted "assumption" or "presumption" which cannot stand in the face of the evidence. As was said in *Del Vecchio v. Bowers*, 296 U. S. 280, 80 L. Ed. 233:

"Consideration of fairness and experience in human affairs induce fact finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, *unless and until the facts are developed by evidence.*" (Italics supplied.)

A presumption is a substitute for proof. (*Heiner v. Donnan*, 285 U. S. 312; 76 L. Ed. 772.) There is neither foundation nor room for any presumption that the payments of \$11.54 admitted a condition of total disability when the proof is otherwise.

There may well have been an overpayment to Mr. Braswell. Under Section 8 (e) the A. & P., instead of paying \$11.54, could have had a finding as to that diminution in earning capacity due to the injury. Mr. Braswell's own physician places such disability at no more than 50 per cent due to any injury. (Appellant's App. 21.) Thus, under Section 8 (c) (21), (e), and (h) the A. & P., at most, should pay only two-thirds of 50 per cent of his \$18.00 weekly salary,—or \$6.00. It would appear that such award of \$6.00 per week is the largest award justified by the facts, and, if

such is the case, the A. & P. is entitled by Section 14 (k) to considerable reimbursement out of any installments of compensation that may be due. No specific reimbursement is sought, however. It is the claim of the A. & P. that it has discharged fully its liability due to any injury, but in no event can there be found any proof in the record of disability due to injury that would justify an award of more than \$6.00 per week.

No attack is made on the 1931 award.

Counsel for the appellees argue that the A. & P. did not attack the award of 1931 immediately thereafter, and hence is now precluded from raising the question that Mr. Braswell's condition is due to causes other than any injury he sustained. We now make no attack on the award of 1931. It was varied on November 22, 1934, and Mr. Braswell on that date was adjudicated to have " * * * a condition of temporary partial disability by reason of the said injury" under Section 8 (e) of the Act (Appellant's App. 17). The liability of the A. & P. thereunder was to pay compensation for a period of five years. This it did from August 1935 through August 1940. Instead of attacking the award of 1931, we are merely asserting our rights under the Modification of Award on November 22, 1934.

In an attempt to meet this inescapable situation, the Appellees argue on page 24 of their brief that even admitting that appellant has paid Mr. Braswell temporary partial disability for a period of five years, yet the Deputy Commissioner had ample authority under the Act to find there has been a change of the employee's condition to one of total disability. I admit such authority exists, and I admit the Deputy Commissioner has found a condition of "temporary total disability" arising "as a result of the injury sustained." However, as pointed out in our original brief, there is not one line of evidence to support such a finding.

Judicial knowledge and notice will be taken of the inability of a man 75 years old to perform the duties required of Mr. Braswell.

Mr. Braswell himself establishes the work he did as a clerk in the grocery store of Appellant as hard work. It was necessary for him to handle " * * * anything from a 2-pound box of cocoa to a 250-pound bag of potatoes." Up until the time he was 63 years of age Mr. Braswell testified he could do this work (Appellees' App. 55). His duties also kept him on his feet for long hours (Appellees' App. 50). Now, at his advanced age of 75 years, the doctors testified (and everyone admits) he cannot do that work. The record will not support any finding that this inability to do the work is due to a change in his condition to one of total disability as a result of any injury, as Appellees' counsel argue. I submit that this Court will take judicial knowledge of the fact that a man of 75 cannot perform the duties which Mr. Braswell performed when he was 12 years younger, even if that man did not have the arthritis which Mr. Braswell had before he received any injury in the employ of the A. & P. Tea Company.

Judicial notice will be taken of " * * * things which must happen according to the laws of nature * * *" (*Brown v. Piper*, 1 Otto 37; 23 L. Ed. 200). Also well-known facts concerning the phenomena of human life in its various forms need not be proved (23 C. J. p. 146; 20 Am. Jur. p. 94). Inability to stand on one's feet for long hours and inability to lift 250-pound bags are at least two things which must happen according to the laws of nature when a man has lived some five years beyond his Biblical allotment of three score and ten.

If disability is due to old age it affects the right to compensation.

In discussing old age as affecting the right to compensation, *Schneider's Workmen's Compensation Law*, Second Edition, says in Par. 404, page 1350:

“Where an employee, 68 years of age, was injured by a fall and sustained a fracture of several ribs, compensation was paid to a certain date, when the payments were stopped on the ground that the applicant’s incapacity was due to increasing old age. The California commission in denying further compensation said: ‘The Workmen’s Compensation, Insurance and Safety Act provides compensation only in those cases where the injury is proximately caused by the accident. It is the intent of the act to make the industry chargeable with those consequences of accident which are proximately due to the injury and not to those consequences which are remotely due to the injury. * * * industry cannot properly be charged with those consequences of injury for which the accident is only remotely responsible. That is, in the case of applicant Udell, his lack of recuperative power is proximately due to age and not to accident. * * * his accident was only the occasion and not the cause of this loss. The cause was his advanced years and very high blood pressure, arterio-sclerosis, a degenerative myocarditis, the general condition being further emphasized by a hernia of long standing.’ ”

In looking at the similarity of the present case to the foregoing, let us bear in mind: (1.) that in 1929, prior to any injury, Mr. Braswell had a stiff back (Appellants’ App. 23); (2.) that Mr. Braswell is old for his age as he “is an elderly man, appearing somewhat older than his actual age” (Appellants’ App. 22); (3.) that his own physician testified the X-ray pictures showed the pre-existing hypertrophic type of arthritis grew gradually worse from 1934 to 1940 in about the normal way expected in a man of that age (Appellant’s App. 20); and, (4.) his own physician testified Mr. Braswell had a calcification of the abdominal aorta which could progress to a point so as to be disabling (Appellant’s App. 21). These four facts did not grow out of and were not caused by any injury received in the employ of the Appellant. Without these factors being present a man of 75 could not carry on the duties Mr. Braswell says were required of him, and with these conditions *for no one of which is Appellant re-*

sponsible, it is manifestly impossible for him to be other than totally disabled.

In applying the English Workmen's Compensation Act, the House of Lords in 1914 affirmed the arbiter's "finding that the disability due to the injury had ceased, and that whatever incapacity the employee labored under, was due to the fact that he did no hard work for so long a period, and from the further fact that he had a natural tendency to obesity which rendered him less and less fit for labor of any kind." The employee was 60 at the time of the accident and was 63 at the time the arbiter ended the payments on the findings stated above. (*Clark v. Taylor*, 11 N. C. C. A. 54.)

There are three interesting cases cited in the footnote to the foregoing case in 11 Negligence Compensation Cases Ann. pages 54 through 58. One of these is the *Udell* Case hereinabove set out as quoted by Mr. Schneider. Another is a Massachusetts case where it appears the 68 year old employee " * * * was of failing physical powers and that he would probably be incapacitated for work in a few years as a result thereof, independently of his injuries." The Massachusetts court held this fact "did not bar the injured employee from compensation under the act, if his incapacity to work was the result of his injuries." The third case is from Ohio, where it was found "that claimant's disability was due to the infirmities of age, he being prematurely aged at 58, and that no part of his then disability was due to the injury," and no further compensation was allowed.

The present disability of Mr. Braswell is not the result of any injury, but is entirely due to causes unconnected with his employment by the A. & P.

CONCLUSION.

While it is recognized that the findings of the Deputy Commissioner may not be disturbed if supported by any competent evidence, yet this Court has recognized that effect may be denied to such findings " * * * if they are without

evidence or contrary to the indisputable character of the evidence". (*Hoage v. Royal Indemnity Co.*, 67 App. D. C. 142; 90 F. (2d) 387; Cert. and Pet. to Rehear Den. 302 U. S. 736 and 778, 82 L. Ed. 569 and 602). It is respectfully submitted that the present case is just such as this Court had in mind in using the language quoted from the Royal Indemnity Co. Case.

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